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THE ISLAMIC LAW OF REBELLION:

The Rise and Development of the Juristic Discourses on Insurrection, Insurgency and Brigandage

Volume One

Khaled Medhat Abou El Fadl

A DISSERTATION
PRESENTED TO THE FACULTY
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To my father, Medhat Abou El Fadl

To my mother, Afaf El-Nimr

For enduring so much, for patiently waiting,

and for tolerating rebellion.

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Preface

A few preliminary remarks are in order. This work is based on years of research, and, therefore, I was often forced to use several editions of the same work. For instance, I would start out using a Cairo edition of a certain work, but might, years later, find that only a Beirut edition was available for my use. This is the reason that the bibliography will contain several citations to different editions of the same work. Furthermore, I have consulted a large number of sources which I decided not to cite. I have omitted such sources from the bibliography.

In citing jurists, I have included a long version of a jurist's name in the first cite. In subsequent citation, I used the name that commonly identifies a particular jurist, which may or may not be a jurist's proper last name. Furthermore, I have included the dates of death of jurists in the footnotes where I thought that identifying the era of a jurist was pertinent to the argument. At times, I have repeated the date of death when reminding the reader that such date is of particular relevance.

Pre-finally, the order of cites in a long footnote is not organized alphabetically or chronologically. The cites are organized by order of significance or relevance in documenting the point cited. I suspect that readers look up citations by the order of their occurrence in a footnote. In other words, they will start with the first cited work and so on. Therefore, I tried to put forward the most significant cites first.

Finally, writing acknowledgments to those who have shared or guided one's intellectual labor is a rather frustrating task. It is difficult to write acknowledgments which do not sound *pro-forma* or which properly reflect the true depth of gratitude that one feels. Therefore, I apologize in advance for my inhibited originality and limited creativity. I owe everything to my advisor, mentor and inspiration, Professor Hossein Modarressi. I am grateful for his unfailing wisdom and boundless knowledge. The value of his guidance and support has proven to be immeasurable in my life. Most of all, I thank him for his kindness; I have taxed his patience. The shortcomings of this dissertation in no way reflect upon him or his scholarship.

I am grateful to Professors Abraham Udovitch, Michael Cook and Andras Hamori for their years of support and for the numerous moments of delightful enlightenment. I am also grateful to Professor Udovitch for serving on my committee, and to Professors Cook and Hamori for kindly agreeing to read this work. I thank my friends and brothers in arms, Shihab Ahmed, Mohammed Fadel and Sherman Jackson, for numerous stimulating conversations, and for years of supportive friendship. Furthermore, I owe my wife, Grace, and my friend and student Anver Emon an enormous debt of gratitude. Grace endured years of obsession fed by self-generated frustration. Both Grace and Anver read numerous drafts of this dissertation, and kindly endured hours of forced conversation. I cannot imagine how this work could have progressed without them.

I would be quite remiss not to thank the Department of Near Eastern Studies at Princeton University for being such a wonderfully welcoming and supportive place. I also wish to thank the Department and the Whiting Fellowship for years of financial support. I am grateful to them for facilitating some of the best years of my life at Princeton.

Post-finally, and most importantly, I would like to thank the enthralling jurists of Islam, who have left such a wonderfully rich and complex intellectual legacy, and whose books I have had the honor to have and to hold, in sickness and in health, for richer or for poorer, and for better or for worse, so help us ...

ABSTRACT

Contemporary scholarship has tended to describe Muslim juristic discourses on politics as either quietist or activist – idealist or pragmatist. These categories, however, are unhelpful in understanding the subtleties of the legal discourses on resistance and rebellion. Furthermore, these generalized dichotomies fail to take account of the creative and negotiative processes of Islamic law. Muslim juristic discourses were neither quietist nor activist, but were thoroughly technical and legalistic. In fact, one must focus on the technical linguistic practices and micro-discourses of a juristic culture in order to properly evaluate the functional and moral goals espoused by the discourse. Only by looking beyond the general exhortations and absolute principles, and focusing on the technicalities of the linguistic practice, can one start to understand the process through which Muslim jurists sought to negotiate with the institutions of power. In order to explore this issue, this dissertation examines the emergence and development of the juristic discourses on rebels and rebellion from the 2nd/8th to the 9th/15th centuries. Muslim jurists creatively co-opted and restructured several competing historical precedents and doctrinal sources in order to construct a highly technical discourse on rebellion. Muslim jurists developed a conceptual distinction between a bandit and a rebel, and conceded to rebels who attempt to overthrow the ruler a certain degree of legitimacy. In a sense, Muslim jurists de-criminalized the act of rebellion, and protected rebels from the accusation of banditry. The focus of Muslim jurists, however, was not on assessing the legitimacy of rebellion, but on the treatment that should be afforded to rebels. In response to certain historical contexts such as the fragmentation of the 'Abbāsid empire and the Mongol invasion, eventually, two distinct juristic trends developed on the law of rebellion. The traditional trend continued to repeat the inherited doctrines out of the force of legal habit, and not necessarily conviction. On the other hand, the revisionist trend adopted several creative and negotiative constructs, such as arguing that unjust rulers may be treated as bandits, or that unjust rulers may not be aided against rebels. Finally, the dissertation ties the pre-modern discourses to some of the contemporary discourses demonstrating possible fields of development for this field of law.

INTRODUCTION

Discoursing on Rebellion

One of the most important issues confronting Islamic law today is how to balance the obligation to obey God against the fact that God's Will is represented by human beings. In Islamic thought, God is the authoritative source of law, but what is the balance between God's authoritativeness and the potential for human authoritarianism? From an institutional and social point of view, God's Will could be represented by a variety of political or social realities including an absolute ruler, a court, a body of clergy, an ingrained bureaucracy, a well-established social practice or even the unchallenged assertions of the head of a household. From a doctrinal and, perhaps, dogmatic perspective, God's Will is represented primarily by the ruler and jurists who are considered God's agents on the earth. Doctrinally, both rulers and jurists, to different extents, are empowered to construct and represent the Divine Will. Inherent to this dichotomy between Muslim rulers and jurists is an implicit form of negotiation -- a power sharing or, at times, competition. The negotiative dynamic between rulers and jurists in Islamic history has produced a complex and rich doctrinal discourse which, at least as understood and constructed by the juristic culture, has been recorded in Islamic legal sources. An integral part of this negotiative discourse is the law of rebellion in Islam. This juristic discourse deals with the moral and legal position of those who rebel against the political authority of the state, and addresses the treatment that should be afforded to such rebels. Importantly, these juristic discourses carry considerable normative weight in the contemporary age and, therefore, they may exercise a powerful prescriptive influence on how oppositions and armed struggles of any sort are understood and treated in the modern Islamic world.

The purpose of this study is to examine the Islamic law of rebellion. This stated purpose, however, needs to be qualified in certain significant respects. Joseph Schacht has described Islamic law as a case of "jurists' law."[1] By this, Schacht meant that Islamic law has developed through a process of theoretical, juristic discourse. Without endorsing Schacht's views on the history or nature of Islamic law, this study will focus on the Islamic juristic discourses on rebellion rather than the Islamic or Muslim law of rebellion.[2] Conceptually, one should distinguish between the juristic discourses, Islamic law and Muslim law. In order for one to speak of the Islamic law of rebellion, one would need to point to a set of authoritative or canonical rules that apply to a specific behavior that is identified as rebellion. Essentially, one would need to point to a set of legal standards that define an act of rebellion, and thus, indicate when the canonical rules would come into force. This study, however, goes beyond explicating the doctrinal rules that apply to the treatment of rebels. Muslim juristic discourses incorporate the rules of Islamic law, but also engage in a rhetorical dynamic through which the jurists adjudicate, advocate, protest and aspire for certain goals.

An investigation into the Muslim law of rebellion would need to engage in several inquiries which are not the primary focus of this study. Such an investigation would need to focus on the positive legal enactments in various periods of Islamic history that identified an act of rebellion, and that responded to those accused of such an act. It would also need to address the way by which the political and legal order actually dealt with those who chose to challenge or disobey its imposed system of order within specific historical contexts. Therefore, one would have to address the actual treatment of rebels and rebellion in different stages of Islamic history.[3] Furthermore, one would have to examine closely the process by which these legal practices were justified in terms of an Islamic frame of reference, and hence, can be considered part of the Islamic legal heritage.[4] While this approach has obvious merits, it is rather limiting because it would have to be qualified by specific historical and social practices. Therefore, one would have to speak, for instance, of the 'Umayyad law of rebellion or the Ottoman law of rebellion. This study, however, focuses on the intellectual history of the law of rebellion as understood and constructed by the jurists. Muslim juristic discourses do selectively incorporate and creatively reconstruct the legal practices of society. Therefore, it is necessary to contextualize these discourses within certain historical events, and to examine these discourses in light of a historical continuum. Nevertheless, the issue of the actual legal practices on rebellion requires numerous other and more specific socio-historical studies.

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[1] Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), 5. Schacht states: "Islamic law represents an extreme case of 'jurists' law'; it was created and developed by private specialists; legal science and not the state plays the part of a legislator, and scholarly handbooks have the force of law." Schacht, however, overstates his case. Several recent studies indicate that the role of the state in the development of Islamic law is far more complex than Schacht assumes. Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Leiden: E.J. Brill, 1996), esp. pp. 185-224; Hossam Mohammad Fadel, "Adjudication in the Maliki Madhhab: A Study of Legal Process in Medieval Islamic Law" (Ph.D. diss., University of Chicago, 1995), esp. 2-120; Christopher Melchert, *The Formation of the Sunni Schools of Law: 9th-10th Centuries C.E.* (Leiden: E.J. Brill, 1997), esp. p. 200; Muhammad Qasim Zaman, *Religion and Politics under the Early 'Abbāsids: The Emergence of the Proto-Sunni Elite* (Leiden: E.J. Brill, 1997).

[2] Relying on the fact that Islamic law developed through a process of juristic discourses, Schacht reaches the conclusion that Islamic law represents a unique phenomenon of legal science, Schacht, *Introduction*, 210. He further argues that Islamic law is perhaps not law at all, as if the concept of law did not exist in Islam. Ibid., 200. I would take serious issue with Schacht's conclusion that Islamic law is simply a juristic discourse but not law. I also take issue with his contention that Islamic law is a unique phenomenon of legal science but not a legal system. Besides being ahistorical, Schacht's view relies on a very limited and strict positivist definition of law.

The primary focus of this study will be the debates among Muslim jurists on the idea of rebellion, and on the way a rebel was understood, constructed or deconstructed. We are not only interested in the various positive enactments or legal rules that Muslim jurists argued should apply to rebels, but also in the value or moral judgments that Muslim jurists passed on the act of rebelling. Hence, for example, we are not only interested in whether Muslim jurists thought a rebel should be executed, but also whether they thought that a rebel was committing a sinful act, or *a priori*, whether they thought that a crime was being committed at all. Importantly, we are interested in the dynamics of the juristic process. More specifically, we are interested in the process by which Muslim jurists approached the doctrinal sources and selectively reconstructed the sources in response to political and social dynamics. We will focus on the way Muslim jurists negotiated law and power through the medium of language, and responded to their understanding of political and social demands through a variety of creative acts.

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[3] To what extent one can consider historical, or for that matter, contemporary state practices to be "Islamic" is open to debate. Nevertheless, the Muslim legal system as represented by Muslim legal practices, and not just the juristic discourse has been ignored for too long.

[4] Of course, regardless of the frame of reference, these practices may still be considered a part of the Muslim, as opposed to the Islamic, legal heritage.

In this context, we are using the word "rebellion" in its most general sense; it means the act of resisting or defying the authority of those in power. There is a broad array of acts that could qualify as an act of rebellion. On the one hand, rebellion could be an act of passive non-compliance with the orders of those in power, or on the other hand, it could be an act of armed insurrection. A rebellion could take the form of a counter-culture that seeks an alternative mode of social expression, or it could take the form of an assassination attempt against a famous religious or political figure. But beyond the issue of the means or form which a rebellion may take, there is also the issue of the target of a rebellion. A rebellion could be directed against a social or political institution. Alternatively, it could be directed against the religious authority of the *'ulama* or the idea of God. Often it is extremely difficult to distinguish between one form of rebellion and another. For instance, it is not always possible to distinguish between heresy, treason, sedition, revolt, or an act of political opposition. Frequently, the line drawn between one and the other does not necessarily relate to the nature of the act, but rather, is a matter of degree. The difference, for example, between an act of sedition and an act of treason will depend on the context and circumstances of such an act, and on the constructed normative values which guide the differentiation. Therefore, often the distinction created between one and the other is quite arbitrary in nature.

This study does not attempt to create a theoretical construct distinguishing one act from another, and then attempt to fit Islamic legal discourses within the framework of that theoretical construct. Rather, this study attempts to understand and make sense of the legal categories and distinctions made by Muslim jurists, and then reach certain conclusions about the nature of these juristic discourses. I am interested not only in what these juristic discourses were trying to achieve politically and socially, but also what these discourses can tell us about the pre-modern Muslim juristic culture. For example, as discussed later, one of the often-reached conclusions about Muslim legal history is that Muslim jurists were realists and quietists. Muslim jurists, it is often argued, traded in an extreme form of political idealism for an equally extreme form of political pragmatism, and in doing so, have advocated politically passive or quietist positions. This study will take issue with these generalizations.

This study, however, does not simply aim to reach an ultimate judgment about the role of political pragmatism in Islamic juristic discourses. More importantly, it is interested in tracing the way language, historical events and religious doctrines are co-opted, constructed or channeled to reach certain legal positions. For example, the word used by Muslim jurists to describe an act of rebellion is *baghy*. The word comes from the root word *baghā* which in its various forms could mean: 1) to desire or seek something; 2) to fornicate or cause corruption; or 3) to envy or commit injustice.[5] The process by which this term was co-opted and used in Islamic juristic discourses is not only useful for understanding how rebels were perceived or understood, but it is also important for understanding the creative process by which Islamic law expresses a legal development. Put differently, the methodology used by Muslim jurists in constructing and arguing for an Islamic law of rebellion is extremely probative in understanding the process by which Islamic law changes and develops. In fact, the failure to pay careful attention to the linguistic practices, or the terminology and the specific methods, by which Muslim jurists discoursed on Islamic law, I believe, is largely responsible for the view that Islamic law has remained static and unchanging since the 4th/10th century.[6] In the area of the law of rebellion, Muslim juristic discourses continued to develop and change within the paradigm or framework constructed by Muslim jurists themselves for discoursing on the subject.

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[5] Abu al-Faḍl Muḥammad Ibn Manẓūr, *Lisān al-ʿArab* (Cairo: Dār al-Maʿārif, n.d.), vol. 1, 321-323.

This study traces the development of Islamic legal discourses on rebellion by relying on original sources spanning from the 2nd A.H./8th C.E. to the 14th/20th centuries. Nonetheless, the main focus of this study is the development of the legal discourse from its incipient years to the 11th/17th centuries. I argue that the law of rebellion, as a systematic and coherent body of discourse, in all probability developed in the late 2nd/8th century, and continued to be restated, re-articulated and reconstructed within the same framework until the 11th/17th century. With the advent of the age of colonialism and modernity, the discourses on rebellion, but not necessarily the law of rebellion, were co-opted by Muslim activists and underwent major reconstructions. In the modern age, the classical juristic rules which deal with the treatment of rebels have been to a large extent ignored. Nonetheless, there has been a reconstructed debate on waging *jihād* against unjust rulers, but this matter deserves a separate study.[7] This study focuses on the juristic discourses on *'aḥkām al-khawārij wa al-bughā* (the law relating to rebels) and on *'aḥkām al-ḥirāba* (the law relating to bandits and brigands). The difference between brigands and rebels will be explored later. *'Aḥkām al-ridda wa al-zandaqa* --the laws of apostasy and heresy, although they overlap in certain important respects with the law of rebellion require a separate treatment. Finally, although I have consulted the major sources in both Sunni and non-Sunni traditions, the main focus of this study will be on the Sunni schools of thought.

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[6] Schacht and others have argued that Islamic law ceased to develop since the end of the 3rd/9th or the beginning of the 4th/10th centuries. Schacht, *Introduction*, 70-71; J.N.D. Anderson, *Law Reform in the Muslim World* (London: Athlone Press, 1976), 7; N.J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 81. This view has been ably challenged by the work of several scholars. See Abraham L. Udovitch, *Partnership and Profit in Medieval Islam* (Princeton: Princeton University Press, 1970); Baber Johansen, *The Islamic Law on Land Tax and Rent* (London: Croom Helm, 1988); Wael B. Hallaq, "Was the Gate of Ijtihad Closed?" *International Journal of Middle East Studies* 16 (1984): 3-41, reprinted in *Law and Legal Theory in Classical and Medieval Islam* (Brookfield, Vermont: Variorum, 1994); Idem, "Model *Shurūṭ* Works and the Dialectic of Doctrine and Practice," *Islamic Law and Society* 2, no. 2 (June, 1995): 109-134. See, also, Khaled Abou El Fadl, "Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities From the Second/Eighth to the Eleventh/Seventeenth Centuries," *Islamic Law and Society* 1, no. 2 (1994): 141-187; Idem, "Tax Farming in Islamic Law: A Search for a Concept," *Islamic Studies* 31, no. 1 (Spring 1992): 5-32.

[7] For an excellent introduction to the topic of *jihād* against unjust or corrupt rulers, see Rudolph Peters, *Islam and Colonialism: The Doctrine of Jihad in Modern History* (The Hague: Mouton Publishers, 1979), esp. 39-165.

Review of the Literature

'Aḥkām al-bughā, or the juristic discourses on rebellion, have received very little attention in both non-Muslim and Muslim modern scholarship. Nevertheless, there has been no shortage of statements about the absence of a right to rebellion in Islamic legal discourses. Most commentators have tended to focus on the history of Islamic discourses on the Caliphate, and then deduced from this history the Islamic position on rebellion. Very little attention has been given to the specific juristic tradition from which *'aḥkām al-bughā* arose, or to the specific legal paradigm upon which Muslim jurists relied. Contemporary commentators have tended to treat Muslim juridical pronouncements on the duty of obedience to those in power as if they are a genre of political thought or theory. The legal culture that provided these jurists with the terms of their discourse, and that imposed modes of thought and expression, have been largely ignored.[8]

In its most basic formulation, the accepted thesis is that Muslim jurists moved from the absolute realm of political idealism to an absolute realm of political realism. Muslim jurists insisted on strict qualifications for the position of Caliph, and insisted that the Caliphate only be assumed through a proper *ʿaqd* (contract) and *bayʿa* (pledge of allegiance). The Caliph had to be pious and just, and had to enforce the *Sharīʿah*.[9] Importantly, only a single just *’imām* may represent the *khilāfah* and the *’ummah*. If the Caliph is neither legitimate nor just, the *’ummah* may remove him and replace him with another.

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[8] Aziz al-Azmeh, *Muslim Kingship: Power and the Sacred in Muslim, Christian and Pagan Polities* (London: I.B. Tauris Publishers, 1997), 171, recognizes the specifically legalistic nature of the juristic theories of the Caliphate. However, as will be noted, when it comes to juristic discourses on rebellion, al-Azmeh, himself, fails to heed his own warning against ignoring the legalistic nature of Islamic juristic discourses. Hamid Enayat, *Modern Islamic Political Thought* (Austin: University of Texas Press, 1982), 4, notes that pre-modern Islamic political thought was always subsumed under some other discipline. E.I.J. Rosenthal, *Political Thought in Medieval Islam: An Introductory Outline* (Cambridge: Cambridge University Press, 1962), 31, notes that pre-modern Muslim jurists were not political philosophers, and that politics as a discipline did not interest them. But he does not take account of the specific legal culture of Muslim jurists.

These requirements and qualifications were a pious ideal which perhaps was never realized. According to H. A. R. Gibb, in response to the Khawārij's anarchy and fanatical revolts, the jurists were increasingly forced to deprecate the right of rebellion against an unjust *’imām*.[10] The two civil wars in early Islam, and the constant rebellions in the first two centuries pressured Muslim jurists to emphasize the duty of obedience to the ruler, whether just or unjust, and to engage in endless polemics about the evils of rebellion and anarchy. In other words, Muslim jurists reacted by going to the other extreme -- from an extreme of idealism to an extreme of realism.[11]

The power and influence of the ʿAbbāsid Caliphate steadily decreased throughout the 3rd/9th century. By the 5th/11th century, the ʿAbbāsid Caliphate had been reduced to virtual impotence. According to Gibb, the first theoretical and systematic compromise was a pious invention by the Shāfiʿī jurist al-Māwardī (d. 450/1058) as he attempted to defend the Caliphate against the Buwayhid warlords and the Fāṭimids ruling Cairo. Under certain conditions, al-Māwardī recognized the legitimacy of usurpation as a means of coming to power in the provinces. Al-Māwardī argued that the usurper, by pledging allegiance to the Caliph and complying with certain conditions, became the Caliph's agent.[12] Effectively, al-Māwardī had created a legal fiction of sorts;[13] under certain circumstances a usurper could become the Caliph's agent even if the Caliph had no real power to restrain or direct his agent. Gibb insists that al-Māwardī had opened the door for the eventual supremacy of political expediency over legal order. I will quote Gibb at length because it is important to demonstrate the tenor of his argument on this point. Gibb states:

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[9] On the traditional qualifications demanded of the Caliph, see H.A.R. Gibb, "Constitutional Organization," in *Law in the Middle East: Origin and Development of Islamic Law*, ed. Majid Khadduri and Herbert J. Liebesny (Washington, D.C.: The Middle East Institute, 1955), 6-14.

[10] Ibid., 6.

[11] Ibid., 15.

[12] Ibid., 18-19; H. A. R. Gibb, "Al-Māwardī's Theory of the Caliphate," *Islamic Culture XI* (1937), 291-302, reproduced in Idem, *Studies on the Civilization of Islam* (Princeton: Princeton University Press,

> "It must be supposed that in his zeal to find some arguments by which at least the show of legality could be maintained, al-Māwardī did not realize that he had undermined the foundations of all law. Necessity and expediency may indeed be respectable principles, but only when they are not-invoked to justify disregard of the law. It is true that he seeks to limit them to this case, but to admit them at all was the thin end of the wedge. Already the whole structure of the juristic theory of the Caliphate was beginning to crumble, and it was not long before the continued application of these principles brought it crashing to the ground."[14]

Gibb argues that increasingly, Muslim political theory became an after-the-fact rationalization of actual historical practices, as Muslim jurists ignored any moral imperatives and focused on the sole element of power.[15] Muslim jurists not only sanctioned the authority of those who usurped power, but also made obedience to them a

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1962), 151-165; W. Montgomery Watt, *Islamic Political Thought* (Edinburgh: Edinburgh University Press, 1968), 101-102; Ann Lambton, "Changing Concepts of Authority in the Late Ninth/Fifteenth and Early Tenth/Sixteenth Centuries," in *Islam and Power*, ed. Alexander S. Cudsi and Ali E. Hillal Dessourki (Baltimore: Johns Hopkins University Press, 1981), 55; Al-Azmeh, *Muslim Kingship*, 169, argues that systematic, juristic statements on the Caliphate were a 5th/11th century innovation by al-Māwardī and Abū Ya'lā.

[13] In this context, Rosenthal, *Political Thought*, 30-31, states: "What appears to us as pious fraud, as born of political expediency, as condoning aggression and brute force must be set against the overriding principle ruling the guardians and interpreters of Muslim law: to preserve the unity of the Muslim community under the authority of the *khalīfa* whose religious aura increased in proportion to the decrease of his effective power and authority." Evidently, Rosenthal is not aware of the quite common use of legal fictions in Islamic and non-Islamic legal systems. I would argue that Muslim jurists were not necessarily preserving the unity of community. Rather, they were doing what was, by training and habit, dictated by their legal culture; that is, resolving conflict and maintaining order. See infra pp. 25-32 on the function of law and the roles of jurists.

[14] Gibb, "al-Māwardī's Theory," 164; Hanna Mikhail, *Politics and Revelation: Māwardī and After* (Edinburgh: Edinburgh University Press, 1995), 43, criticizes Gibb's overly dramatic presentation of al-Māwardī but seems to accept Gibb's basic conclusions.

[15] Gibb, "al-Māwardī's Theory," 162; Ann K. S. Lambton, *State and Government in Medieval Islam: An Introduction to the Study of Islamic Political Theory: The Jurists* (Oxford: Oxford University Press, 1981), 84.

moral and legal, as well as religious, obligation. Thus, according to Gibb, the belief was fostered "that rebellion is the most heinous of crimes, and this doctrine came to be consecrated in the juristic maxim, 'Sixty years of tyranny are better than an hour of civil strife.'"[16]

Shortly before al-Māwardī's death, the Saljuks gained control of Baghdād in 447/1055. The next main figure usually mentioned in this context is the Shāfi'ī jurist Abū Ḥāmid al-Ghazālī (d. 505/1111).[17] Al-Ghazālī wished to reconcile the temporal powers of the sultanate to the religious authority of the Caliph. The Caliph would officially confer the title of sultan upon sovereign princes in the temporal field. Hence, al-Ghazālī went further in legitimating usurpation as a legitimate means of gaining power. According to Ann Lambton, he was preoccupied with the threat of internal disturbances (*fitan*), and the dangers posed by the Bāṭinī movement to Sunni Islam. He was far less concerned with the danger posed by the external threat of the Crusades.[18] Al-Ghazālī placed an undue emphasis on the duty to obey those in power, even if unjust or impious. Al-Ghazālī's rather infamous statement is usually quoted in this context:

> "An evil-doing and barbarous sultan, so long as he is supported by military force, so that he can only with difficulty be deposed and that the attempt to depose him would create unendurable civil strife, must of necessity be left in possession and obedience must be rendered to him, exactly as obedience is required to be rendered to those who are placed in command.... We consider, then, that the caliphate is contractually assumed by that member of the 'Abbāsid house who is charged with its functions, and that the office of government (wilāya) in the various lands is validly executed by the sultans who profess allegiance to the caliph....For if we were to decide that all wilāyāt are now null and void, all institutions of public welfare would also be absolutely null and void....Nay, but the wilāya in these days is a

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[16] Gibb, "Constitutional Organization," 15; Enayat, *Modern Islamic*, 12, lends his support to this argument in stating: "Acknowledging the necessity of strong government...is one thing; justifying tyranny in the name of religion is another. The price of medieval flexibility was to sanctify the latter position, which soon became the ruling political doctrine among the majority of Muslims of all sects."

[17] Imām al-Ḥaramayn al-Juwaynī (d. 478/1085), Ghazālī's teacher, frequently receives honorable mention in this context. See Lambton, *State and Government*, 104-105; Mikhail, *Politics and Revelation*, 50. I deal with al-Juwaynī's views later.

[18] Lambton, *State and Government*, 109.

> consequence solely of military power, and whosoever he may be to whom the holder of military power professes his allegiance, that person is the caliph. And whosoever exercises independent authority, while he shows allegiance to the caliph by mentioning his name in the khuṭba and on the coinage, he is a sultan, whose orders and judgments are executed in the several parts of the earth by a valid wilāya."[19]

After explaining that these concessions are involuntary but necessary, al-Ghazālī then asks rhetorically:

> "Which is the better part, that we should declare that the qāḍīs are divested of their functions, that all the wilāyāt are invalid, that no marriages can be legally contracted, that all executive actions in all parts of the earth are null and void, and to allow that the whole creation is living in sin – or to recognize that the imāmate is held by a valid contract, and that all executive acts and jurisdictions are valid, given the circumstances as they are and the necessity of these times?"[20]

The Mongol invasion finally destroyed the 'Abbāsid Caliphate in 656/1258, but by then, all vestiges of political legitimacy had disappeared. According to the prevailing scholarly view, Muslim jurists were willing to accept raw power, without anything further, as grounds for political legitimacy. The next often discussed figure is the Syrian Shāfi'ī jurist Ibn Jamā'a (d. 733/1333).[21] Born in Ḥalab, he later moved to Jerusalem and lived the majority of his adult life as a judge in Mamlūk Egypt.[22] Ibn Jamā'a equates power with legality, and, according to Gibb, he abandons law in favor of secular absolutism.[23] Another much quoted statement by Ibn Jamā'a is the following:

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[19] Quoted in Gibb, "Constitutional Organization," 19. This passage is also quoted by Lambton, *State and Government*, 116-117. See also Rosenthal, *Political Thought*, 42.

[20] Quoted in Gibb, "Constitutional Organization," 19-20; Henri Laoust, *La Politique de Gazālī* (Paris, 1970), 88, argues that Ghazālī incorporated both the caliphate and sultanate in a mixed theory of the *'imāma*.

[21] See Mikhail, *Politics and Revelation*, 28; Lambton, *State and Government*, 138-151; Rosenthal, *Political Thought*, 43-51; Gibb incorrectly identifies Ibn Jamā'a as a Ḥanafī, "Constitutional Organization," 23.

[22] The Mamlūk Dynasty flourished in Egypt between 648/1250 and 922/1517.

[23] Gibb, "Constitutional Organization," 23.

> When the imāmate is thus contractually assumed by one person in virtue of his military power and conquest, and there subsequently rises up another who overcomes the first by his might and his armies, then the first is deposed and the second becomes imām, on the grounds which we have already stated, namely, the well-being and unity of the Muslims.[24]

The reproduction of these long quotes is justified by the fact that these statements have had a pervasive influence on the way political authority was analyzed in Islamic history, particularly as it pertains to the issue of quietism and activism. With Ibn Jamā'a, the journey from political idealism to realism, with a few exceptions, had become complete.[25] Order and stability became the primary concern; neither legitimacy nor justice mattered.

Admittedly, I do not find this view of the history of Islamic political thought, despite its wide acceptance, to be entirely convincing. But for our purposes, this is not the material issue. Rather, the material issue is that this view has resulted in certain conclusions about the right to rebellion and the treatment of rebels in Islamic jurisprudence, which are largely inaccurate. For example, Gibb concludes that Muslim jurists ultimately adopted quietism and rejected any right to rebellion against an unjust *'imām*.[26] Lambton agrees and adds that neither Sunnī nor Shī'ī jurists discussed the issue of rebellion at any length.[27] According to Lambton, the problem of tyranny presented a practical as well as a theoretical problem, and "in the conflict between ideal and practice, it came to be recognized that tyranny prevailed."[28]

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[24] Quoted in Ibid.

[25] Ibn Taymīyya, for example, insists on the ideal of *Sharī'a* but ignores the question of the *khilāfa* altogether, see Rosenthal, *Political Thought*, 51-61.

[26] Gibb, "Constitutional Organization," 6, 15.

[27] Lambton, *State and Government*, 261-63.

[28] Ibid., 313. Louise Marlow, *Hierarchy and Egalitarianism in Islamic Thought* (Cambridge: Cambridge University Press, 1997), 40-41, argues that quietism was eventually endorsed by Sunnī and Shī'ī jurists. Michael Cook, "Activism and Quietism in Islam: The Case of the Early Murji'a," in *Islam and Power*, ed. by Cudsi and Dessouki, 21-22, argues that the activist heritage reflects the importance of tribal society in Islamic history. With the demobilization of tribal armies and large scale conversions to

Hanna Mikhail is critical of Gibb's conclusions regarding the stark realism of Muslim jurists. Mikhail argues that although Muslim jurists accepted the political reality, they continued to insist that Muslim rulers strive towards certain ideals. Mikhail notes, for example, that both al-Māwardī and Ibn Jamā'a continued to insist that a ruler fulfill the requirements of religion and justice.[29] But, ultimately, he concurs in the judgment that Muslim jurists became quietists – demanding absolute obedience to unjust rulers and forbidding rebellion.[30] In fact, Mikhail concludes that in the 8th/14th century, Abū Ḥayyān (d. 754/1353-4) "stands out as a voice in the wilderness" when he argues that force may be used against an unjust ruler.[31]

Fazlur Rahman argues that there is no law of rebellion in Islam. Whatever activist tendencies that might have existed in early Islam became extinct as the Murjī'a's quietist doctrine of non-judgment became widespread. According to Rahman, Muslim jurists rationalized any political reality that might have confronted them, and forbade any rebellions against an established ruler.[32] Bernard Lewis, however, notes that both the quietist and rebellious traditions are old and deeply rooted in Islam. He argues that the quietist-authoritarian and the activist-rebellious traditions competed throughout early

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Islam, Muslim masses who had no hope of partaking in the political process emerged. The result was political quietism.

[29] Mikhail, *Politics and Revelation*, 28.

[30] Ibid., xxxii, 16, 38, 50.

[31] Ibid., 50. Mikhail further concludes that since the 13th/17th century, most theological works either held that 1) between injustice and rebellion, Muslims must choose the lesser evil, or 2) rebellion is always the greater evil. Mikhail does not seem to distinguish between theological and legal works. Furthermore, he does not seem to give adequate weight to the significance of this equation.

[32] Fazlur Rahman, "The Law of Rebellion in Islam," in *Islam in the Modern World: 1983 Paine Lectures in Religion,* ed. Jill Raitt (Columbia, Missouri: University of Missouri-Columbia, n.d.), 1-10; also see Tamara Sonn, "Irregular Warfare and Terrorism in Islam: Asking the Right Questions," in *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition,* ed. James Turner Johnson and John Kelsay (Westport, Connecticut: Greenwood Press, 1990), 133-138. Cook, "Activism and Quietism," p. 15-23, argues that the Murjī'a started out as an activist creed and subsequently evolved towards quietism.

Islamic history.[33] It was only with much reluctance and difficulty that Muslim jurists accepted the necessity of obedience to tyranny.[34] Ultimately, complete quietism was accepted.[35]

Riḍwān al-Sayyid seems to agree with this basic assessment. He argues that there were two distinct trends concerning the caliphate: a law-based trend and a realism-based trend. The law-based trend insisted on the caliphate being contracted by a proper contract and *bay'a* (pledge of allegiance given to the ruler), while the realism-based trend accepted the rule of the usurper. According to al-Sayyid, Abū 'Abd Allāh al-Ḥalīmī (d. 403/1012-3) was the last representative of the law-based trend. Al-Ḥalīmī refused to recognize the legitimacy of the usurper. Al-Ḥalīmī argued that only a caliph who came to power through a proper contract must be recognized as the legitimate ruler even if he lacked political power. The legal acts (such as adjudicating cases or collecting taxes) performed by a usurper were recognized only in one situation. If a usurper controlled one of the provinces, and the just caliph was weak and unable to impose his authority, then the legal acts of the usurper could be recognized. However, according to al-Ḥalīmī the usurper would remain illegitimate; legitimacy could only be granted to the ruler who came to power through legal means. Al-Sayyid, however, argues that the realism-based trend became dominant, and juridical quietism became the norm.[36]

Integral to the quietism thesis is the argument that temporal authority split from religious authority in Islam. The Sunnī Caliph lost his religious authority to the jurists, and his political authority to the Sultans.[37] Muslim jurists concerned themselves with the administration of religious law and left secular concerns to those in power. Therefore, as long as Muslim jurists could be recognized as the guardians of religious law, they were willing to ignore issues concerning political justice and even to lend support to unjust rulers. Patricia Crone puts it nicely: "Intellectually, it is the very totality of the disjunction between the exponents of state and religion that explains why the relationship between the two could come to be seen even by the medieval Muslims as a symbiosis: once the divorce was finalized, there was nothing to obstruct an improvement in the relationship between the divorcees."[38]

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[33] Bernard Lewis, *The Political Language of Islam* (Chicago: University of Chicago Press, 1988), 92. Also see pp. 101-102 where Lewis reproduces the infamous quotes from al-Ghazālī and Ibn Jamā'a. Somewhat inconsistently, Lewis asserts that the duty of obedience to *legitimate* authority is a religious obligation, and that disobedience is a sin as well as a crime at Ibid., 91.

[34] Ibid., 100; Bernard Lewis, *Islam in History: Ideas, People and Events in the Middle East*, 2nd ed. (Chicago: Open Court, 1993), 290.

[35] Lewis, *Islam in History*, 314.

[36] Riḍwān al-Sayyid, *Al-'Umma wa al-Jamā'a wa al-Sulṭah: Dirāsāt fī al-Fikr al-Siyāsī al-'Arabī al-'Islāmī* (Beirut: Dār 'Iqra', 1984), 136-143. I will argue that the issue of recognizing the legal acts of the usurper needs to be completely re-examined.

Muhammad Zaman challenges this simple dichotomy between the religious authority of the jurists and the political authority of the rulers. Zaman argues that the *'ulamā'* (jurists) existed in a cooperative relationship in which they shared religious and political authority. This cooperative relationship existed before the *miḥna* (inquisition) which was instituted in 218/833 by the 'Abbāsid Caliph al-Ma'mūn. According to Zaman, *al-miḥna* was an attempt by the rulers to challenge the authority of the *'ulamā'*, and to claim a certain degree of religious competence. The challenge ultimately failed. Post-*miḥna*, a certain degree of tension and conflict continued to exist between the *'ulamā'* and the authorities, but it was cooperation, patronage and the sharing of religious and political authority that became the earmark of the relationship between the *'ulamā'* and the rulers. In other words, no real separation between politics and religion ever took place, at least during the early 'Abbāsid period.[39] Partly because of this relationship of patronage or because of political repression, the *'ulamā'*, in the early 'Abbāsid period and onwards, became political quietists as they rejected the option of rebellion.[40]

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[37] Patricia Crone and Martin Hinds, *God's Caliph: Religious Authority in the First Centuries of Islam* (Cambridge: University of Cambridge Oriental Publications, 1986), 19. Crone and Hinds, however, argue that this is not the way things began. They argue that the early 'Umayyad Caliphs did enjoy considerable religious authority.

[38] Patricia Crone, *Slaves on Horses: The Evolution of the Islamic Polity* (Cambridge: Cambridge University Press, 1980), 88.

[39] Zaman, *Religion and Politics*, 81-82, 105-106.

Aziz al-Azmeh recently published a powerful challenge to the whole framework from which the issue of authority and legitimacy in Islamic history is approached. Al-Azmeh argues that much of the contemporary discourse on pre-modern Islamic thought is, among other things, ahistorical.[41] Muslim juristic discourses on the *imāma* cannot be understood in terms of realism or idealism. Muslim jurists were neither idealistic nor realistic, but simply and thoroughly legalistic.[42] Muslim jurists and theologians were functioning under what al-Azmeh calls, the historical absolutist imperative. The absolutist imperative arises from the anthropology and conceptions of power of the age.[43] Pursuant to this historical imperative, it was not entirely surprising that the caliphs would be perceived and discoursed upon as mini-Gods, beyond good or evil.[44] The emphasis of early writers was on order and the need to obey the ruler, who was often portrayed as a shepherd taking care of his sheep. These conceptions of power were Islamized through the works of Muslim jurisprudence and the sanctification of Islamicity.[45] Al-Azmeh argues that it was never the case that politics became secular and devoid of religious influence. Rather, with al-Māwardī, there was an attempt to create a reliance on the *'ulamā'* as a corporate group.[46] In due time, the *'ulamā'* created a corporate religious logic on which politics could find, and even judge, itself.[47] By the time of Ibn Jamā'a, there is a representation of the "*'ulamā'* as an autonomous corporate group capable of standing in for political power in the regulation of public affairs in the absence of a convincing king..."[48] However, correlative with this development was an insistence by the jurists on the idea of obedience to those in authority, and that disorder was worse than injustice. Although the jurists might have denied the rulers titles such as *khalīfat Allh* (the caliph of God), the status and function of ruling was perceived and discoursed upon with a high degree of devotional sanctification. Obeying the ruler was considered a part of obeying God. The only limitation or condition imposed is largely theoretical -- the ruler cannot be obeyed if he orders something contrary to the divine command. But even this limitation is, at times, "ruled out as a disobedience of disobedience."[49] In al-Azmeh's colorful language: "In all, the rhetorical and visual assimilation of the caliph to prophecy, to divinity, to a charismatic line, and his conception in terms of inviolability, incommensurability, ineffability, and sheer potency, produced a critical mass creative of a sublime and holy authoritarianism, one which flows in the social and imaginary-conceptual capillaries of Muslim political traditions."[50]

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[40] Ibid., 49, 76, 78, 81-82, 98.

[41] Al-Azmeh, *Muslim Kingship*, 74.

[42] Ibid., 171.

[43] Ibid., 115-153.

[44] Ibid., 77.

[45] Ibid., 100-101.

[46] Ibid., 106-107.

[47] Ibid., 104.

Integral to al-Azmeh's argument is that Muslim jurists did not start out with a political ideal that degenerated into coarse opportunism. Rather, Muslim jurists worked under a historical absolutist imperative that produced a certain practice, which was then systematized from historical practice into juristic form. Importantly, al-Azmeh asserts: "The imperative of absolutism was also the *leitmotif* behind the universal aversion to the idea of contesting a ruling power. Sedition in Muslim law books is a legal offense of great consequence, attendant upon which is a particularly rigorous statutory penalty (*ḥadd*)."[51]

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[48] Ibid., 103.

[49] Ibid., 123, al-Azmeh argues that, ultimately, the inconsistency between the absolute duty to obey the ruler and God is never resolved. The theoretical possibility of disobedience to the ruler is left open but with much ambiguity.

[50] Ibid., 162.

[51] Ibid., 173.

But he adds: "That Māwardī and other jurists did not propose a legal theory for sedition is unsurprising, and does not imply, as modern Western scholarship generally assumes, the opportunistic legalization of injustice."[52]

Al-Azmeh is correct in criticizing most contemporary works for not taking the historical context sufficiently into consideration. Furthermore, al-Azmeh's basic argument about the existence of a historical absolutist imperative is sound. But one problem with al-Azmeh's argument is that he does not closely examine Islamic legal texts, and thus, concludes that sedition in Islamic law is a grave crime punishable by a *ḥadd*.[53] By sedition, one can only assume that he means rebellion or perhaps insurrection. But when we examine Islamic legal sources, we will find that this is not an accurate description of the juristic discourses. How should one then analyze this fact? One option, and the option that I suspect al-Azmeh would prefer, is to say that this fact is inapposite; Muslims jurists were writing thoroughly legalistic works, and technical legalistic questions of legitimacy were irrelevant.[54] However, if one makes this argument, then one cannot cite the supposed absence of discourses on sedition as evidence for the supremacy of the absolutist imperative. More fundamentally, when one argues that legalistic questions were irrelevant, it is not quite clear what one means by this claim of irrelevance. If one claims that legalistic distinctions and discourses did not influence the historical, social or political practices of Muslims, that is quite possible. But this is an empirical claim that needs to be examined within the confines of a specific historical period and place. If, on the other hand, one claims that the legalistic distinctions made by jurists were irrelevant to the way the juridical culture understood or dealt with power, this argument hardly makes any sense.[55]

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[52] Ibid., 174.

[53] Al-Azmeh, for example, states: "it is the opinion of the vast majority of jurists that sedition, whatever its cause and even when directed against a miscreant or maleficent ruler, is illegitimate." Ibid., 108.

[54] See Ibid., 165, where al-Azmeh argues that legalistic discussions on the legitimacy of Marwān b. al-Ḥakam or 'Abd Allāh b. al-Zubayr remained without doctrinal, dogmatic or political consequence. Al-Azmeh also argues that although al-Māwardī, for example, stated preferences for certain positions, "there is no implication that these were in any way binding on the caliph, who had the same capacity for legal decision as does a judge." Ibid., 170.

Al-Azmeh warns that legal works by Muslim jurists must be read within the specific genre to which they belong. They must be read as books of law and not political theory.[56] He also argues that Muslim legal works systematized past practice in juristic form.[57] But al-Azmeh does not sufficiently recognize the role of legal culture. Legal works do not simply appropriate reality and then systematize it.[58] Jurists also work within a legal paradigm that might be called, to modify a phrase, the "legal imperative." This legal imperative, by the very nature of law, as will be discussed below, favors order and stability. But order and stability is the framework from which law begins, and then aspires to achieve certain social and political goals. If, as al-Azmeh seems to argue, Muslim jurists responded to a historical reality and an imperative of absolutism and nothing else, then we can hardly make sense of *'aḥkām al-bughā* as a discourse.

I do not wish to overstate my case; as stated above, al-Azmeh provides a very useful paradigm by which we can understand conceptions of power and authority in pre-modern Islam. As al-Azmeh demonstrates, arguments by contemporary scholars about quietism and a journey from idealism to realism are ahistorical. Importantly, however, they also make very little sense in terms of how law works, and they fail to explain the continued existence of *'aḥkām al-bughā*. I agree with al-Azmeh that it is surprising to find jurists condoning sedition or rebellion. But it is surprising, not only because of an absolutist imperative, but because the crude advocacy of rebellion or sedition is quite contrary to the tendencies of law and the role of jurists.

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[55] The failure to carefully examine the legal sources allows al-Azmeh to argue that shortly after al-Māwardī, compulsion became a legitimate means of appointment to power at par with other means of appointment, Ibid., 172-173. In fact, compulsion as a means to power became recognized long before al-Māwardī.

[56] Ibid., 170.

[57] Ibid., 173.

[58] Al-Azmeh makes the rather sweeping claim that all jurists at all times and places are realists. Ibid., 170. I agree that a successful jurist needs to be a realist to a certain extent, but that is quite different from claiming that all jurists are realists. Jurists also work within a specifically legal culture that incorporates precedent as well as social, political and religious goals. In his "Islamic Legal Theory and the Appropriation of Reality," in *Islamic Law: Social and Historical Contexts*, ed. Aziz al-Azmeh (London: Routledge, 1988), 250-261, al-Azmeh makes a convincing case that Islamic law was not simply theory but very much appropriated reality.

Interestingly, despite al-Azmeh's criticisms of Gibb, Lambton and others, he ultimately endorses the argument that Muslim jurists forbade rebellion and demanded absolute obedience to those in power. Al-Azmeh historicizes the debate but he does not disagree with its basic conclusions. Aside from the argument about the absolutist imperative, I have three main criticisms of what I have called the accepted view in contemporary scholarship. The first criticism is terminological, the second is theoretical, and the third is theological.

First, as discussed above, the accepted view argues that Muslim jurists became quietist rather than activist. Nonetheless, the terminology of activism or quietism is extremely unhelpful, and only serves to obfuscate and obscure the role of jurists and the functions of law. It is never clear what is meant by quietism or activism, or in what sense modern commentators are using them. For example, if a jurist advocates disobedience to the law, is he being activist or lawless? If a jurist advocates passive non-compliance with what he considers to be an illegal order, is he being activist or is he advocating an individualized and subjective notion of justice? If a jurist leaves open the possibility of rebellion by arguing that one should rebel only if that is the lesser evil, is that a lawless or quietist argument? One cannot intelligibly start to answer these questions until one first defines the legal framework within which a jurist is acting. Quietism and activism are inherently relative and subjective terms, and they acquire a concrete meaning only from within a specific context.[59]

The second criticism flows naturally from the first. The accepted view maintains that Muslim jurists had become quietist because they had accepted the legitimacy of the usurper and forbade rebelling against him. But if one argues that power could legitimately be obtained by usurpation, the necessary implication is that usurpers could be legitimate. In other words, if the act of usurpation could create political legitimacy, then the attempt to achieve this legitimacy is not necessarily reprehensible. Or, to put it differently, if those who are in power are perceived, in an ideal sense, to have an absolute moral claim to power, then those who rebel cannot be perceived to have any legitimacy. But if those who are in power are perceived to have a functional claim to power, that cannot preempt the moral claim of those who rebel against them. If, for example, a jurist claims that a usurper must, of necessity, be obeyed, the jurist is conceding a functional or practical legitimacy to the usurper. But this means that the usurper's claim to power is relative because it arises out of simple necessity. The necessary implication is that a challenger to the usurper's power may also have a relative claim to legitimacy. In other words, as a matter of logic, if one recognizes the legitimacy of usurpation, one also implicitly recognizes the functional legitimacy of rebellion. This point demonstrates the extent to which the language of quietism versus activism is unhelpful. Pursuant to the logic above, recognizing the legitimacy of a usurper could be an activist stance.

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[59] For example, the activism of a soldier could be the use of force. The activism of a jurist could be the issuing of decisions that are unhelpful to the government.

Third, besides the existence of a historical and legal imperative, there is also a theological imperative. The accepted view fails to take account of the early and late debates on early civil wars and rebellions in Islam. As discussed later, some of the most esteemed religious figures in Islam rebelled against those who were in power. 'Ā'isha bint Abī Bakr (d. 58/678), Ṭalḥa b. 'Ubaydullāh (d. 36/656) and al-Zubayr b. al-'Awwām (d. 36/656) rebelled against 'Alī b. Abī Ṭālib (d. 40/661); al-Ḥusayn b. 'Alī (d. 61/680), and others rebelled against the 'Umayyads. These rebellions created a theological imperative. Since Sunnī Muslims insisted on affirming the moral worth of all the companions, if one maintains that armed rebellion against those in power is sinful, perhaps the conclusion that some of the companions were iniquitous would be inescapable. These theological, and legal, precedents either had to be explained away or distinguished, if one were to hold that all rebellions against unjust rulers are a sin. As we will see, these precedents played a powerful and complex role in the discourses on rebellion. Most of the legal discourses on these precedents take place in the field of *'aḥkām al-bughā*. Of course, there are also many discussions on this topic in theological works and in books written on *fitan*. For our purposes, we are interested in the way these early rebellions and civil wars were dealt with as legal precedents. We are not as concerned with the theological apologetics in this field. The point is that these precedents created theological imperatives that influenced the legal discussions on rebellion.

The legitimacy of a usurper or a rebel, and the normative value of the early civil wars are discussed at length in the discourses on *'aḥkām al-bughā*. Of course, I am not arguing that when it comes to understanding how Muslim jurists responded to issues of power and political authority, that the only relevant discourse is that which is found in *'aḥkām al-bughā*. Rather, *'aḥkām al-bughā* is simply one part, yet certainly a very crucial part, of the total framework that informs our understanding of how Muslim jurists understood and dealt with issues of power and authority.

As noted above, *'aḥkām al-bughā* has received very limited attention in modern scholarship.[60] Some contemporary scholars have discussed or incorporated aspects of this field into their writings without being fully aware that they were dealing with a specific type of legal discourse.[61] Some have dealt with the field as a specific discourse, but committed many technical errors or failed to take account of the progressive development of the juristic discourse.[62] Works by contemporary Muslim lawyers have tended to explore the implications of the field on the doctrine of political crimes.[63] There have been few works on the related topics of terrorism and political dissent in Islamic law. But these works do not get beyond unhelpful polemics, and are seriously handicapped by an inability to use original sources.[64]

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[60] Joel Kraemer has written a very helpful introduction to this and other related issues: Joel L. Kraemer, "Apostates, Rebels and Brigands," *Israel Oriental Studies* X (1980): 35-73. Also see Khaled Abou El Fadl, "*Aḥkām al-Bughat*: Irregular Warfare and the Law of Rebellion in Islam," in *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Traditions*, ed. James Turner Johnson and John Kelsay (Westport, Ct.: Greenwood Press, 1990), 149-179; Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore, Md.: Johns Hopkins Press, 1955), 77-80, has a short section on fighting the *bāghī* and on highway robbers.

[61] Mikhail, *Politics and Revelation*, 23, for example, quotes a rather typical passage from *'aḥkām al-bughā* but does not otherwise draw attention to this field of law. He treats the passage as if it is unique to al-Māwardī, and concludes that the passage aims to "accommodate to the 'Abbāsid caliphate a variety of dissident groups" such as the Shī'īs and Fāṭimids. Riḍwān al-Sayyid, *al-'Umma*, 138-139, seems to treat the issue of recognizing the legitimacy of legal acts performed in the jurisdiction of a usurper as a 5th/11th century development, and as part of the realism-based trend, as opposed to the law-based trend, in Islamic discourses. As we will see, this issue is a common part of the discourses on the *bughā*, and is a fairly early development. Lewis, *Political Language*, 81-82 discusses the law of rebellion in Islam. In his, *Islam in History*, 318, after a short discussion on *'aḥkām al-bughā*, Lewis concludes: "...it is clear that what the

As discussed later, *'aḥkām al-bughā* has rather clear implications for contemporary discourses on political dissent and terrorism. In fact, perhaps no intelligible discussion can take place on these issues without incorporating *'aḥkām al-bughā* into the analysis. Yet, one must be careful not to confuse the views and debates of professional Muslim jurists with some grand metaphysical reality called Islam. Many works equate the institutionalized

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jurists have in mind is not an attempt to overthrow the regime but merely to withdraw from it and establish an independent state within a certain territory. In a word, their concern is not with revolution, but with secession." I will argue that this is not accurate.

[62] Muhammad Hamidullah, *The Muslim Conduct of State*, 7th ed. (Lahore: Sh. Muhammad Ashraf, 1977), 178-187; his treatment is generally accurate but he confuses Ḥanafī doctrines with the doctrines of other schools. Furthermore, he does not discuss the progressive development of the law; Mohammad Hashim Kamali, *Freedom of Expression in Islam* (Kuala Lumpur: Berita Publishing, 1994), 183-206, discusses the topic at length, but his treatment is full of inconsistencies and inaccuracies. For example, he confuses the legal doctrine of giving permission to fight the rebels with a legal rule decreeing the death sentence for an act of rebellion. He assumes that because it is legally permissible to fight the rebels, then it also means that they may be executed, see esp. 198. 'Aḥmad Fatḥī Bahnasī, *Madkhal al-Fiqh al-Jinā'ī al-'Islāmī* (Cairo: Dār al-Shurūq, 1980), 95, makes the same error.

[63] See Midḥat Abū al-Faḍl, "Jarīmat al-Baghy fī al-fiqh al-'Islāmī," *al-Muḥāmī* (April-May-June, 1982), 69; Najātī Sayyid Sanad, *Naẓariyyat al-Jarīma al-Siyāsiyya fī al-Qawānīn al-Waḍ'iyya al-Muqārana wa fī al-Sharī'a al-'Islāmiyya* (Cairo: Top Guy, n.d.); 'Abd al-Qādir 'Ūdah, *al-Tashrī' al-Jinā'ī al-'Islāmī* (Beirut: Dār al-Kitāb al-'Arabī, n.d.), vol. I, 100-109, vol. II, 671-705; Muḥammad 'Abū Zahra, *al-Jarīma wa al-'Uqūba fī al-Fiqh al-'Islāmī: al-'Uqūba* (Cairo: Dār al-Fikr al-'Arabī, n.d.), 148-149, deals with political crimes under the topic of *hirāba*. See, on contemporary treatments, Khaled Abou El Fadl, "Political Crime in Islamic Jurisprudence and Western Legal History," *U.C. Davis Journal of International Law and Policy* 4, no. 1 (Winter, 1998): 1-28. Khālid Rashīd al-Jamīlī, in his two-volume work on the subject, *'Aḥkām al-Bughā wa al-Muḥāribīn fī al-Sharī'a al-'Islāmiyya wa al-Qānūn*, 2 vols. (Baghdād: Dār al-Ḥurriyya, 1977), does not get beyond mass reproduction of long quotes from original sources.

[64] For example, see David Aaron Schwartz, "International Terrorism and Islamic Law," *Columbia Journal of International Law* 29 (Summer 1991): 629-652; Donna E. Arzt, "Heroes or Heretics: Religious Dissidents under Islamic Law," *Wisconsin International Law Journal* 14 (Spring 1996): 349-421. A few studies have been done on the related topic of apostasy in Islamic law. See Rudolph Peters & Gert J. De Vries, "Apostasy in Islam," *Die Welt des Islams* 17 (1976-77) is a solid study. S. M. Zwemer, *The Law of Apostasy in Islam* (London: 1924), and L. Bercher, "L'apostasie, le blaspheme et la rebellion en droit Musulman malekite," *Revue Tunisienne* (1923): 115-130 are religiously motivated and not very helpful.

views of jurists, and the greater reality of Islam. Besides being essentialist, it does not make methodological sense. The juridical discourses are only a part of the reality of Islam. Furthermore, these discourses reflect the institutional, ideological and sociological role of the jurists, and are very much a product of the historical context.

Muslims jurists responded to a variety of historical and sociological contexts and demands. In the field of rebellion, Muslim jurists also responded to theological demands, e.g. how does one declare rebellion to be a crime without suggesting that some of the most esteemed companions of the Prophet were criminals? Significantly, however, they also worked within an inherited legal culture that imposed its own logic and language. Muslim jurists literally invented the field of *'aḥkām al-bughā* by reconstructing and emphasizing certain theological precedents and de-emphasizing others.[65] Muslim jurists invented the field for both theological and political reasons. Once the corporate identity of the jurists developed and a body of precedents and legal discourses were firmly established, Muslim jurists labored under what might be termed a legal imperative or the logic of law. Like all good legal minds, Muslim jurists affirmed a general legal principle: those in power must be obeyed. But they went on to riddle the field with qualifications, exceptions and provisos as to render the general principles quite complicated,[66] and to elicit the classic legal response to many legal issues -- "It depends."

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[65] The issue of whether Muslim jurists invented the precedents, as opposed to picking and choosing from a variety of circulating precedents in order to invent a field of law, is entirely uninteresting. The type of reconstructive or revisionist work that Schacht and others have done and do with Islamic law is not consistent with the way law develops. See Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950); Norman Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Clarendon Press, 1993). For a technical critique of Schacht, see Muhammad M. Al-Azami, *On Schacht's Origins of Muhammadan Jurisprudence* (New York: John Wiley & Sons, Inc., 1985). Fazlur Rahman, *Islamic Methodology in History* (Islamabad: Islamic Research Institute, 1965), and 'Aḥmad Hasan, *The Early Development of Islamic Jurisprudence* (Islamabad: Islamic Research Institute, 1970) outline a more convincing methodology than that which is employed by Schacht and Calder. It is certainly true that jurists are painfully dependent on precedent and authority. However, while they may re-organize, and selectively emphasize and de-emphasize certain precedents over others, they do not usually invent them.

[66] Interestingly, Bernard Lewis seems to see this process in the reverse. He states, "In time, the duty of disobedience was hedged around with restrictions and qualifications and was in effect forgotten in the general acceptance, in theory as well as in practice, of the most complete quietism." Lewis, *Islam in History*, 314.

Before turning to *'aḥkām al-bughā*, I will address the issue of the logic of law. As discussed above, an analysis of juristic discourses on rebellion or insurrection cannot be performed without first making explicit the assumptions about law and legal culture that inform the analysis. Furthermore, this discussion is crucial for establishing our understanding of the legal context in which Muslim jurists constructed their discourses.

The Function of Law and the Role of Jurists

One of the basic and most essential functions of law is to resolve conflicts and maintain order. Perpetuation of order is in the nature of law. The very idea of law is about defining privileges, rights or limits, and resolving disputes or competing claims to an asserted privilege or limit by the imposition of order.[67] Law could have various goals or aspirations, and the dynamics of law could reflect a variety of values. It could aspire to achieve justice or channel social behavior, or serve certain economic classes or interests.[68] But this does not necessarily negate the idea that law aspires to resolve conflicts and uphold stability and order. Of course, there have been innumerable theories dealing with the nature and function of law arising from rationalist and empiricist epistemologies. Such theories have relied on a wealth of moral, historical and social insights.[69] For example, Lon Fuller has argued that law is purposive human activity because it relies on the collaborative articulation of shared purposes. Law, according to Fuller, has an inner morality which relies on, what he calls, the principles of procedural natural law.[70] John Finnis, on the other hand, has argued that reasonable laws must serve "basic human goods" such as life, health, knowledge and sociability. Unreasonable laws violate basic human goods in either individual or social life by contravening what Finnis calls "modes of responsibility."[71] Some jurists from the positivist tradition advocated the rather simplistic notion that the purpose of law is to maximize the public good[72] or that law is the command of the sovereign backed by the threat of sanction.[73] Furthermore, several theorists relying on sociological perspectives, focused on the social dynamics of law. For example, Roscoe Pound argued that law is the product of the conflict and balancing of interests in society. The essential task of law, Pound argued, is social engineering in order to achieve particular social results.[74] Several theoretical approaches, most notably from within the movement of American realism, focused on the process by which law resolves controversies and conflicts, and thus, tended to understand law as a means to social ends.[75]

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[67] Alan Watson, *The Nature of Law* (Edinburgh: Edinburgh University Press, 1977), 41. Watson, however, goes on to argue that the essential feature of law is the existence of a process. The essential function of the process is to resolve actual or potential disputes with the specific object of inhibiting further unregulated conflict. Hence, it is the process which distinguishes law from simple aspirations or rules. According to Watson, law is about a process; the process is about resolving conflict and establishing order. Ibid., 40. For our purposes, we need not reach the issue of process or the essential function of such a process. However, my point is more simple; achieving and maintaining order and stability is one of the main functions of law. Carl Joachim Friedrich, *The Philosophy of Law in Historical Perspective*, 2nd. ed. (Chicago: University of Chicago Press, 1963), 206-214, argues that justice and order are co-dependent; one cannot be realized without the other. But this is a normative argument; order should not be put before justice because ultimately, order itself is threatened by the lack of justice. This is probably true, but it is difficult to imagine a law, unless it is a moral law, that consists of justice but not order.

[68] See Watson, *Nature*, 9.

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[69] See generally, Jeffrie G. Murphy and Jules L. Coleman, *Philosophy of Law: An Introduction to Jurisprudence*, rev. ed. (Boulder: Westview Press, 1990); J. M. Kelly, *A Short History of Western Legal Theory* (Oxford: Oxford University Press, 1992), 301-454.

[70] Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964). Fuller's principles are 1. generality; 2. promulgation; 3. prospective legal operation; 4. intelligibility and clarity; 5. avoidance of contradictions; 6. avoidance of impossible demands; 7. constancy in time; and 8. congruence between official action and declared rules. Also, from the natural law tradition, Philip Selznick argues that law relies on the principle of legality which is contrary to arbitrariness. The aim of a legal system is to reduce such arbitrariness which of necessity exists in positive law. Scientific inquiry about the proper ends and values can produce a scientific, but not necessarily eternal, natural law. Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley: University of California Press, 1992); Philip Selznick and Philippe Nonet, *Law and Society in Transition: Toward Responsive Law*, 1st ed. (New York: Harper & Row, 1978); Philip Selznick, Philippe Nonet, and Howard M. Vollmer, *Law, Society and Industrial Justice* (New York: Russell Sage Foundation, 1969). Morris Raphael Cohen, another author from the natural law tradition, argues that law expounds rules that serve as norms. Such norms command obedience and control conduct. Such norms must be studied as normative jurisprudence, and normative jurisprudence depends on ethics. Morris Raphael Cohen, *Law and Social Order: Essays in Legal Philosophy* (New Brunswick: Transaction Books, 1982); Idem, *Reason and Law: Studies in Juristic Philosophy* (Glencoe, Ill.: Free Press, 1950); Idem, *The Faith of a Liberal* (New Brunswick: Transaction, 1993). On classical natural law theory, see A. P. d'Entreves, *Natural Law* (London: Hutchinson, 1951). Heinrich A. Rommen wrote a very interesting, and rather unusual, history of positivism and natural law. He strongly attacked the historical and philosophical role of positivism. Rommen argued that law performs many functions such as teaching civic values, rendering justice, preserving order and promoting social harmony. Law is a peremptory command which excludes certain options from the realm of individual choice. However, law does not consist merely of facts induced by force, but also by principles of obligation, discoverable by experience and reason. Heinrich A. Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy*, trans. Thomas R. Hanley (Indianapolis: Liberty Fund, Inc., 1998).

[71] Finnis argues that the first principle of natural morality is the principle that one ought to choose, and to will those, and only those, possibilities whose willing is compatible with integral human fulfillment. In other words, one ought not to will those possibilities that are incompatible with integral human fulfillment. This abstract first principle is given content through intermediate principles (modes of responsibility). Examples of intermediate principles are: 1. do unto others as you would have done unto you; 2. that one should not answer injury with injury, even when one could do so fairly; or 3. that one should not commit evil in the hope of achieving good. A law that contravenes these intermediate principles would be unreasonable. See John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980); also see John Finnis, Joseph Boyle and Germain Grisez, *Nuclear Deterrence, Morality and Realism* (Oxford: Oxford University Press, 1987).

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[72] Jeremy Bentham, *The Limits of Jurisprudence Defined* (New York: Columbia University Press, 1945); Idem, *Of Laws in General* (New York: The Athlone Press, 1970).

[73] John Austin, relying on the idea of the pedigree of law, argues that law is a command from the sovereign that obliges a person to act because of the threat of sanction. Austin also argues that law is habitually obeyed. John Austin, *Lectures on Jurisprudence*, 5th ed. (London: John Murray, 1885); Idem, *The Province of Jurisprudence Determined* (New York: Noonday Press, 1954). Arising from a different philosophical basis, Kelsen argues that law is a normative science. Law consists of a hierarchy of norms backed up by the threat of a sanction. Each norm derives from a superior norm until one reaches the *Grundnorm*. The *Grundnorm* is the initial hypothesis of the law which is not derived from a higher norm. Hans Kelsen, *Pure Theory of Law*, trans. M. Knight, 2nd ed. (Berkeley and Los Angeles: University of California Press, 1967). In a much more sophisticated positivist theory, Hart challenges Austin's theory of the sovereign. Hart argues that law consists of primary and secondary rules. Primary rules are duties without a system of priority or application. Secondary rules cure the inconsistencies of primary rules. Secondary rules consist of rules of recognition, rules of change and rules of adjudication. H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961).

[74] Roscoe Pound, *Social Control Through Law* (New Brunswick: Transaction Publishers, 1997); Idem, *An Introduction to the Philosophy of Law* (New Haven: Yale University Press, 1952), 47. Pound argues that the process of law engages in a "fiction of interpretation in order to maintain the general security." Ibid., 49. Pound's point is that the legal process does not simply and mechanically apply fixed rules to human conduct, but engages in a creative and complex process of social engineering. Other sociological perspectives include Rudolph Von Jhering, Eugen Ehrlich, Leon Duguit and others. Von Jhering argues that law depends on coercion, norms and purpose, and is the product of social life as supported by the power of the state. The purpose of law is to secure the conditions for social life. On Von Jhering, see Kelly, *A Short History*, 332-3. Ehrlich argues that law is produced by social facts or forces operating in society which exist in the conviction of people. The source of most norms is society, and not the state. The center of gravity of legal development is society, and not legislation or courts; Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. Walter L. Moll (Cambridge: Harvard University Press, 1936). Leon Duguit, claiming to rely on a scientific positivist method, argues that law is produced by objective conditions of social solidarity, and that the function of law is to promote social solidarity. On Duguit, see Kelly, *A Short History*, 355-6. For other authors who argue that law is the product of binding social facts or that law is determined by social welfare, see Alf Ross, *On Law and Justice* (London: Stevens Publishers, 1958). On Alf Ross, Vilhelm Lundstedt, and Karl Olivecrona, see Kelly, *A Short History*, 369-71.

[75] John Chipman Gray, *The Nature and Sources of the Law*, 2nd ed. (Boston: Beacon Press, 1963); Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (New York: Oceana Publications, 1951); Idem, *The Common Law Tradition* (Boston: 1960); Jerome Frank, *Law and the Modern Mind* (New York: Tudor Publishing Co., 1930).

None of the theories mentioned above is necessarily inconsistent with the idea that one of the essential functions of law is to resolve conflict and impose order. For one, none of the roles mentioned above are reachable without the imposition and perpetuation of a system of order.[76] Second, as Alan Watson recognizes, this is a minimalist argument; the minimum function of law is the resolution of conflict and the maintenance of order.[77] This minimum function could then be utilized to achieve justice or channel behavior or any other alternative. However, unlike Watson, I am not arguing that the resolution of conflict and the establishment of order is always and invariably the function of law. Law could and does have many direct functions that vary in response to social and institutional dynamics. Furthermore, as argued later, often the role of law is symbolic; in other words it can communicate values and legitimate power structures or social practices.[78] I am also not arguing that the juridical resolution of conflicts is objective or devoid of social or political values. My argument is that the values of order, stability and conflict resolution are strongly ingrained in a legal culture. A legal system does not easily endorse a state of anarchy or the potential for instability. In response to intense social or political demands, a legal system might legitimate a certain degree of instability or disorder.[79] However, the tendency of a juridical culture is to favor order and stability. It is exactly because law performs social and political functions that it needs order and stability.

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[76] For instance, John Finnis argues that law is a necessary condition of morality because basic human goods cannot be realized without coordinating between many people. Finnis contends that law is necessary to deal with what he calls "co-ordination problems." See Finnis, *Natural Law*. Whether or not one adopts Finnis' specific categories, I would argue that most lawyers would tend to believe that co-ordination, conflict resolution or order is necessary for any substantive vision of justice. Notice, for example, the solemnity, decorum, and order imposed in contemporary courts of law. The assumption is that the imposition of these structures are necessary for the administration of justice.

[77] Watson, *Nature*, 8.

[78] See Richard Abel, "Redirecting Social Studies of Law," 14 *Law & Society* 14 (Spring, 1980): 803, 817-26. Neil MacCormick, *Legal Reasoning and Legal Theory*, rev. ed. (Oxford: Clarendon Press, 1994), 233-9, concedes that law does embody values and that these values are expressed in the statements of the principles of a legal system.

[79] For instance, over certain hotly contested issues, courts might recognize a limited right to civil disobedience, or confronted by widespread rioting, courts might hand down lenient sentences. Furthermore, a goverment, under certain circumstances, might grant clemency to political foes. See Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton: Princeton University Press, 1961), 389-418. Nonetheless, as Kirchheimer demonstrates, systems of justice are thoroughly challenged by political cases. Often a legal system deviates from its asserted normative values and regular procedures when confronted by a political case in which there is political or social pressure, or perceived

Even if, as is the case with Islamic law, the law aspires to fulfill divine commands, this only serves to complicate the analysis. This means that the imperative of temporal order might, at times, be challenged because of an imagined or perceived divine order. As a general matter, divine law does not dictate anarchy. In fact, divine law seeks to resolve conflicts and maintain order, but it does so pursuant to a particular frame of reference and hierarchy of commands. Perhaps divine law sanctifies the demand for justice, but it does not negate the need for order as a necessary condition of law. Jurists, even if working under a so-called "religious system of law" will be concerned with issues of order, conflict resolution and stability. They may also demand that this order be just, or that it would comply with the divine command, but they can hardly be expected to advocate lawlessness or anarchy.

Muslim jurists frequently repeat the formula that a ruler succeeds the Prophet in guarding the religion and regulating the affairs of this world (*ḥirāsat al-dīn wa siyāsat al-dunyā*).[80] *Dīn* (religion) and *dunyā* (temporal worldly affairs) are not necessarily in conflict or inconsistent with each other. When Muslim jurists specify the duties and functions of the *'imām*, they first list the duty of protecting the orthodox religion. The second and third duties are concerned with preserving order and resolving conflict. The second duty is to implement laws to litigants and resolve conflicts so that justice prevails. The third duty is to keep the peace and guarantee security so that people may safely go

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pressure. Courts will often succumb to such pressures by producing swift convictions and imposing harsh penalties. See Ibid., 46-172, 419-31.

[80] See for example, Abū al-Ḥasan 'Alī b. Muḥammad b. Ḥabīb al-Māwardī, *al-'Aḥkām al-Sulṭāniyya wa al-Wilāyāt al-Dīniyya* (Beirut: Dār al-Kutub al-'Ilmiyya, 1985), 5; Badr al-Dīn Ibn Jamā'a, *Taḥrīr al-'Aḥkām fī Tadbīr 'Ahl al-Islām*, ed. Fu'ād 'Abd al-Mun'im 'Aḥmad (Qaṭar: Ri'āsat al-Maḥākim al-Shar'iyya, 1985), 48; Abū al-Qāsim b. Riḍwān al-Mālaqī, *al-Shuhub al-Lāmi'a fī al-Siyāsa al-Nāfi'a*, ed. 'Alī Sāmī al-Nashshār (Morocco: Dār al-Thaqāfa, 1984), 56.

about their affairs.[81] This concern with order and stability is neither unusual nor excessive. Rather, it is fundamental to the function of law and the role of a lawyer. But what if the rule of law is challenged with a rebellion? As Watson states, "violent rebellion is not a stable condition; a situation at rest without unlawful violence will be sought; and the force that emerges as the strongest, whether the existing government, a new government of a different type or a compromise, will want acquiescence in its legal rules."[82] The tendency of a system of law, and the profession of lawyers, will be to gravitate towards a state of stability and order again. If the rebels prevail over a certain territory, or simply overthrow the government but are subsequently defeated, contracts or marriages concluded under the rebel regime might very well be recognized. This recognition is neither a compromise of an ideal nor an opportunistic catering to power. It is simply an attempt to resolve conflict and re-establish order, an attempt which is dictated by the very logic and function of law. Hence, when Muslim jurists argue that the adjudications and legal acts of rebels must be recognized, they are not, as some contemporary scholars assume, being opportunistic or exhibiting a realistic, as opposed to a legalistic, trend.[83] Rather, perhaps in the interests of justice, they are re-establishing order and minimizing disorder.[84]

The argument thus far has been about proclivities or tendencies -- jurists have a proclivity towards order and stability, and towards precedent and continuity.[85] This tendency is well-captured in the legal maxim *stare decisis et non quieta movere.*[86] This is especially so among jurists who are a part of a corporate reality or legal system. There is no doubt that Muslim jurists were a part of a corporate reality which was concerned with, among other things, order and stability. Even if Muslim jurists did attempt to maintain a certain degree of distance from those in power, they still represented the *Sharīʿa* which, as a corporate legal system, imposed its own imperative of order and justice.[87]

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[81] See, for example, al-Māwardī, *al-'Aḥkām*, 18; Muḥammad b. al-Ḥusayn al-Farrā' Abū Ya'lā, *al-Aḥkām al-Sulṭāniyya*, ed. Muḥammad al-Fiqī (Beirut: Dār al-Kutub al-'Ilmiyya, 1983), 27. Also see, Abū al-'Abbās Taqī al-Dīn 'Aḥmad Ibn Taymiyya, *Al-Siyāsa al-Shar'iyya fī 'Iṣlāḥ al-Rā'ī wa al-Ra'iyya* (Beirut: Dār al-'Āfāq, 1983), 138-139; Ibn Jamā'a, *Taḥrīr*, 48-49.

[82] Watson, *Nature*, 76.

[83] See Mikhail, *Politics and Revelation*, 23; Riḍwān al-Sayyid, *al-'Umma*, 138-139.

[84] In fact, as we will see, this is exactly what Muslim jurists say they are doing by recognizing the legal acts of rebels.

[85] This is reflected in the jurisprudential concepts of *qiyās* (rule by analogy), and *'istiṣḥāb* (the presumption of continuity). *Qiyās* and *'istiṣḥāb* share many of the qualities of rule by precedent or *stare decisis*. Both concepts reflect a desire for consistency, predictability and order. On *qiyās* and *'istiṣḥāb*, see Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 1991), 202, 297-308; Subhi Mahmassani, *The Philosophy of Jurisprudence in Islam*, trans. Farhat J. Ziadeh (Malaysia: Penerbitan Hizbi, 1987), 90 ff. See Rupert Cross and J. W. Harris, *Precedent in English Law*, 4th ed. (Oxford: Clarendon Press, 1991), 206.

The question, however, is what happens to the Islamic legal principle that a human being should not be obeyed if it entails disobeying God? This question is not different from the one dealt with in the natural law or even positive law tradition. From the perspective of natural law, one can pose the question in the following way: What happens if one believes a legal rule to be contrary to natural law? Alternatively, from the perspective of positive law, one can pose the question thus: What should one do if one believes the law to be immoral? One option is to refuse to obey an immoral rule. One can argue that the rule is not law at all (natural law) or that the law is unjust, and therefore, bad. As we will see, several Muslim jurists insisted on this option, and argued that an unjust ruler is illegitimate. In fact, they argued that an unjust ruler is the real rebel, and not those who refuse to yield to injustice.

The other option is to weigh the evils of compliance and disobedience. Under this option, when a rule is immoral then, as succinctly stated by Watson, the obligation to obey the law is reduced to two questions:

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[86] "To abide by precedent and not to unsettle things which are settled." Another legal maxim provides that *maxime paci sunt contraria vis et injuria* ("the greatest threat to peace are force and wrong").

[87] See George Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh: Edinburgh University Press, 1981) for a review of the complex institutions of legal learning in Islamic history. See Zaman, *Religion and Politics,* 78-81 for a discussion on the reluctance of the *ʿulamāʾ* to accept judicial positions. See Crone and Hinds, *God's Caliph*, 93-94 on the conflict between the *ʿulamāʾ* and the caliphs over religious authority.

> "First, what effect -- and there need not be any -- will disobedience have upon order? Secondly, if order will be affected by the disobedience, is order in this particular instance a good thing, or does it have such moral or social worth that its preservation outweighs the harm committed by the ... immoral act?"[88]

It makes no sense to describe this position as either opportunistic or quietist. It is quite conceivable that the amount of harm that would result from rebelling against an immoral order would in itself be immoral. Alternatively, an order could be so immoral that the possibility of compliance cannot be entertained.[89] Fundamentally, the balance of social or moral evils doctrine leaves open the possibility of disobedience or rebellion. In other words, it does not preclude disobedience or rebellion because order and stability are not the only relevant moral considerations. As we will see, several Muslim jurists adopted this position as well.

In summary, the dichotomy between quietism or activism is incoherent. Muslim juridical discourses must not only be considered in light of historical imperatives alone. Careful attention must be given to the logic of law that Muslim jurists, and all jurists who function within a legal system, labor under. As stated above, given the fact that order is one of the main functions of law, and that the culture of lawyers creates a proclivity towards favoring stability and the re-establishment of order, it is not at all surprising that Muslim jurists would demand obedience to the law or a government. The surprising fact, and the fact that needs to be analyzed, is why many jurists permitted rebellion at all. This analysis is exactly what will occupy us for the rest of this study.

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[88] Watson, *Nature*, 128. Watson, who is a positivist, although not in the Austinian sense, seems to argue that if a law is morally very wrong, then one must not obey the law. If the law is morally neutral or marginally wrong, then one must engage in the type of balancing act he outlines. It is not clear why he only addresses these two situations -- of a law that is morally very wrong or marginally wrong. It would seem that there is quite a gap between these two points of the moral spectrum.

[89] For example, the majority of Muslim jurists have argued that a person should not comply with an illegal command if it means killing a person or persons, see Khaled Abou El Fadl, "The Common and Islamic Law of Duress," *Arab Law Quarterly* 6, no. 2 (1991): 121-159. Shīʿī scholars have held that *taqiyya* (dissemblance) is not permitted if it involves the killing of innocent people, see ʿAlī Asghar Murwārīd, ed., *Mawsūʿat Silsilat al-Yanābīʿ al-Fiqhiyya* (Beirut: Dār al-Turāth & al-Dār al-ʾIslāmiyya, 1990), vol. 9, 15, 56, 106-107, 165, 191, 220, 240, 269, 275.

CHAPTER 1

THE DOCTRINAL FOUNDATIONS OF THE LAWS OF REBELLION

The Origins of the Discourse

According to Muslim jurists, other than fighting the unbelievers, there are three types of combat (*qitāl*): 1) fighting apostates (*al-murtaddūn*), 2) fighting brigands (*muḥāribūn*), and 3) fighting rebels (*al-bughā*).[90] Apostates may be killed unless they repent; and brigands and highway robbers may be killed, crucified, have a hand and foot amputated, or banished; however, rebels may not be killed, tortured or imprisoned. Apostasy and brigandage are very serious crimes and are punished harshly. Insurrection or rebellion is not a crime and is treated leniently. A *bāghī* (rebel) may not be executed, crucified or tortured. In Islamic discourses, the word for brigandage is *muḥāraba*, which means to contest, to disobey, or to fight.[91] By itself, the word is value-neutral; it does not necessarily connote something illegal or immoral. The word for rebellion is *baghy*, and as noted earlier, it means to demand or exceed the limits or commit injustice.[92] The word is not value-neutral, yet Muslim sources consistently state that the term, in law, does not connote censure or blame (*laysa bi 'ismi dhammin*).[93] However, certain jurists insist that *baghy* is an offense that results in the greatest corruption (*'a'ẓamu al-jināyāti mafsadatan*) because it results in the destruction of life and property.[94] Furthermore, several jurists assert that the law of rebellion, in particular, is so significant that the sole reason the companions of the Prophet fought each other is that so they would teach Muslims *'aḥkām al-bughā*.[95] Yet, other jurists like Ibn 'Ābidīn (d. 1252/1836-7), state that the offense of *baghy* rarely occurs.[96]

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[90] For example, see al-Māwardī, *al-'Aḥkām*, 69.

[91] Ibn Manẓūr, *Lisān*, vol. 2, 816; Muḥammad b. Abī Bakr al-Rāzī, *'Unmūdhaj Jalīl fī 'As'ilah wa 'Ajwibah min Gharā'ib 'Āyi al-Tanzīl*, ed. Muḥammad Riḍwān al-Dāyya (Beirut: Dār al-Fikr, 1990), 117.

[92] Al-Māwardī, for example, says that *baghy* means to use force to demand that which one does not have a right to claim (*al-ta'addī bi'l quwwati ilā ṭalabi mā laysa bi mustaḥaqqin*). Abū al-Ḥasan 'Alī b. Muḥammad b. Ḥabīb al-Māwardī, *al-Ḥāwī al-Kabīr Sharḥ Mukhtaṣar al-Muzanī*, ed. 'Alī Mu'awwaḍ and 'Ādil 'Abd al-Mawjūd (Beirut: Dār al-Kutub al-'Ilmiyya, 1994), vol. 13, 97.

These seemingly paradoxical positions point to the complex origin and context of *'aḥkām al-bughā*. The dynamics of these discourses reflect a complex matrix of theological and political motivations. The juristic discourses utilized and heavily relied on the theological debates about the civil wars between the Prophet's companions, but they also served important political and historical functions. The terminology, and many of the debates, indicate that Muslim jurists were attempting to make history and politics consistent with theology. In doing so, however, they were also reconstructing theology according to the categories of law. Law was the negotiating instrument between history, theology and politics. Furthermore, these juristic debates became the vehicle by which jurists provided commentary on various forms of dissent. One form of dissent could be declared an apostasy or brigandage while another could be declared a *baghy*. In each situation, the legal, and perhaps the symbolic, results are very different. These discourses were the vehicle by which the jurists regularly commented on the legitimacy of the rebellions of, among many others, al-Ḥusayn b. 'Alī (d. 61/680), 'Abd Allāh b. al-Zubayr (d. 72/692), and Muḥammad b. 'Abd Allāh al-Nafs al-Zakiyya (d. 145/762). Furthermore, the jurists discussed responses to the 'Umayyads, Qarāmiṭa, Fāṭimids, and Khawārij, as well as others. Muslim jurists balanced functionalist considerations against theological and moral imperatives, and constructed a highly technical and symbolic discourse.

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[93] See, for example, 'Umar Barakāt al-Biqā'ī al-Makkī, *Fayḍ al-'Ilāh al-Mālik Sharḥ 'Umdat al-Sālik* (Cairo: Maṭba'at al-'Istiqāma, 1955), vol. 2, 303; Sulaymān al-Jamal, *Ḥāshiyat al-Jamal 'Alā Sharḥ al-Manhaj* (Beirut: Dār 'Iḥyā' al-Turāth al-'Arabī, n.d.), vol. 5, 113; 'Aḥmad Shihāb al-Dīn b. Ḥajar al-Haytamī, *Fatḥ al-Jawwād Sharḥ al-Irshād* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1971), vol. 2, 294; Muḥammad al-Khaṭīb al-Shirbīnī, *Mughnī al-Muḥtāj 'ilā Ma'rifat Ma'ānī 'Alfāẓ al-Minhāj* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1958), vol. 4, 124. As discussed later, many jurists state that *baghy* is not a sin. See, for example, Shams al-Dīn Muḥammad b. 'Aḥmad al-Anṣārī al-Ramlī, *Fatāwā al-Ramlī*, printed in the margins of *al-Fatāwā al-Kubrā al-Fiqhiyya*, by 'Aḥmad Shihāb al-Dīn Ibn Ḥajar al-Haytamī (Beirut: Dār al-Kutub al-'Ilmiyya, 1983), vol. 4, 19.

[94] 'Aḥmad b. Muḥammad al-Ṣāwī, *Bulghat al-Sālik li 'Aqrab al-Masālik 'ilā Madhhab al-'Imām Mālik 'alā al-Sharḥ al-Ṣaghīr* [Abū al-Barakāt 'Aḥmad b. Muḥammad al-Dardīr, *al-Sharḥ al-Ṣaghīr* is in the margin] (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1954), vol. 2, 414.

[95] See, for example, Abū Bakr Muḥammad b. 'Abd Allāh b. al-'Arabī, *Kitāb al-Qabas fī Sharḥ Muwaṭṭa' Mālik b. 'Anas*, ed. Muḥammad 'Abd Allāh Walad Karīm (Beirut: Dār al-Gharb al-Islāmī, 1992), vol. 2, 593-4; Idem, *'Aḥkām al-Qur'ān*, ed. 'Alī Muḥammad al-Bajāwī (Beirut: Dār al-Jīl, 1987), vol. 4, 1720, 1722; Abū 'Abd Allāh Muḥammad b. Aḥmad al-Anṣārī al-Qurṭubī, *al-Jāmi' li 'Aḥkām al-Qur'ān* (Beirut: Dār al-Fikr, 1987), vol. 16, 319.

[96] Muḥammad Amīn b. 'Umar al-Dimashqī b. 'Ābidīn, *Radd al-Muḥtār 'alā al-Durar al-Mukhtār Sharḥ Tanwīr al-'Abṣār*, ed. 'Ādil 'Aḥmad Mu'awwaḍ (Beirut: Dār al-Kutub al-'Ilmiyya, 1994), vol. 6, 410.

In order to construct their discourse, Muslim jurists co-opted, constructed, and reconstructed doctrinal and historical precedents. This process, and it is a process, must be understood through a historical continuum. We will address this historical continuum through three main points of development. The first part will deal with the birth of the discourse and its continuation up to the 4th/10th century. The second part will deal with the developed debates in the 5th/11th century. The third part will deal with the continuation and revision of the debates after the Mongol invasions and the destruction of the caliphate in 656/1258. Nevertheless, before tracing the various points of the debates, it is important to lay the proper foundation by reviewing the doctrinal precedents that were co-opted, and that were brought into the service of the legal arguments. It is also important to review the historical context out of which the juristic debates were born.

The Doctrinal Sources

There are two main sources cited for the law of rebellion in Islam: 'Alī b. 'Abī Ṭālib (d.40/661) and the Qur'ān.[97] According to numerous sources, when it comes to

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[97] The conduct of Abū Bakr, the first caliph, (d. 13/634), 'Umar b. al-Khaṭṭāb, the second caliph, (d. 23/644), 'Uthmān b. 'Affān, the third caliph, (d. 35/656), and the 'Umayyad caliph 'Umar b. 'Abd al-'Aziz

Muslims fighting each other, 'Alī is the example and the teacher (*'Alī al-qudwa wa al-mu'allim*).[98] The main points cited as precedent are that: 1) 'Alī refused to attack the rebels, particularly the Khawārij, before he was attacked first; and 2) he spared the lives and property of the prisoners, the wounded, and the fugitive in the Battle of the Camel in 36/656.[99] He refused to take any of the women or children captive, and pardoned his enemies.[100] After the Battle of the Camel, 'Alī ordered that no property would be kept as

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(d. 101/720) is, at times, cited as well. For example, see al-Māwardī, *al-Ḥāwī*, vol. 13, 101, 106; Abū Muḥammad 'Abd Allāh b. 'Aḥmad b. Muḥammad b. Qudāma, *al-Mughnī* (Beirut: Dār al-Kutub al-'Ilmiyya, n.d.), vol. 10, 52; Abū 'Umar Yūsuf b. 'Abd Allāh b. Muḥammad b. 'Abd al-Barr al-Nimrī, *al-Tamhīd li mā fī al-Muwaṭṭa' min al-Ma'ānī wa al-Asānīd*, ed. Muṣṭafā b. 'Aḥmad al-'Alawī, Muḥammad 'Abd al-Kabīr al-Bakrī, et al. (Morocco: Maṭba'at al-Faḍāla, 1982-1991), vol. 23, 338; Abū Ya'lā, *al-'Aḥkām*, 56. However, the main reliance is on 'Alī. 'Uthmān and 'Umar, in particular, are cited only for very specific points of law, for example, whether a killed loyalist should be washed before burial.

[98] For example, see Abū al-Qāsim 'Alī b. Muḥammad b. 'Aḥmad al-Raḥbī al-Simnānī, *Rawḍat al-Quḍāh wa Ṭarīq al-Najāh*, ed. Ṣalāḥ al-Dīn al-Nāhī (Beirut: Mu'assasat al-Risāla, 1984), vol. 2, 1214; Ibn 'Aḥmad al-Makkī, *Manāqib Abī Ḥanīfa* (Beirut: Dār al-Kitāb al-'Arabī, 1981), 345; Abū al-Ḥasan 'Alī b. 'Abī Bakr al-Marghīnānī, *al-Hidāya Sharḥ Bidāyat al-Mubtadī* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, n.d.), vol. 2, 171; Abū Muḥammad Maḥmūd b. 'Aḥmad al-'Ayīnī, *al-Bināya fī Sharḥ al-Hidāya* (Beirut: Dār al-Fikr, 1990), vol. 6, 735, asserts that if it had not been for 'Alī, we would not know how to conduct warfare between *ahl al-qibla*. The same point is made in Abū Muḥammad al-Ḥusayn b. Mas'ūd al-Baghawī, *Sharḥ al-Sunna*, ed. Mu'awwaḍ al-Laḥḥām (Beirut: Dār al-Fikr, 1994), vol. 6, 169-70; al-Māwardī, *al-Ḥāwī*, vol. 13, 104, 121, asserts that Muslims followed the practice of 'Alī (*wa 'alyhā 'amila al-Muslimūn*); The Shī'ī, Muḥammad Ḥasan al-Najafī, *Jawāhir al-Kalām fī Sharā'i' al-Islām* (Tehran: Dār al-Kutub al-Islāmiyya, 1347), vol. 21, 335, states that 'Alī's example left its impact upon people (*wa qad ra'aytum 'āthāra dhalika, huwa dhā sā'ir fī al-nās*); also see, Muḥammad b. al-Ḥasan al-Ḥurr al-'Āmilī, *Wasā'il al-Shī'a 'ilā Taḥṣīl Masā'il al-Sharī'a*, ed. 'Abd al-Raḥīm al-Rabbānī al-Shīrāzī (Beirut: Dār 'Iḥyā' al-Turāth al-'Arabī, n.d.), vol. 11, 58-9. 'Alī is reported to have wondered, "If I would not have come to the people, who would have applied this conduct to them (*law ghibtu 'an al-nās man kāna yasīru fīhim bi hadhihi al-sīra*), Abū Bakr 'Abd al-Razzāq b. Humām al-Ṣan'ānī, *al-Muṣannaf*, ed. Ḥabīb al-Raḥmān al-'A'ẓamī (Riyāḍ: al-Majlis al-'Ilmī, n.d.), vol. 10, 124.

[99] The Battle of the Camel (*waq'at al-Jamal*) took place near Basra between the forces of 'Ā'isha bint Abī Bakr (d.58/678), the Prophet's wife; Ṭalḥa b. 'Ubaydullah (d.36/656) and al-Zubayr b. al-'Awwām (d.36/656); and the forces of 'Alī. 'Ā'isha was defeated, and Ṭalḥa and al-Zubayr were killed.

[100] Abū Muḥammad 'Abd 'Allāh b. Muslim Ibn Qutayba (attributed), *al-'Imāma wa al-Siyāsa* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1969), vol. 1, 77-8; Shihāb al-Dīn b. Ḥajar al-'Asqalānī, *Fatḥ al-Bārī bi Sharḥ Ṣaḥīḥ al-Bukhārī* (Beirut: Dār al-Fikr, 1993), vol. 14, 559; Abū Ja'far Muḥammad b. Jarīr al-Ṭabarī, *Ta'rīkh al-'Umam wa al-Mulūk* (Beirut: Mū'assasat 'Izz al-Dīn, 1987), vol. 4, 581, notes that the Khawārij were unhappy about 'Alī's clemency. Abū Bakr 'Aḥmad b. al-Ḥusayn b. 'Alī al-Bayhaqī, *Kitāb al-Sunan al-Kubrā* (Beirut: Dār al-Ma'rifa, n.d.), vol. 8, 181, mentions a report in which 'Alī's soldiers are distressed by the command not to pursue their defeated enemy (*fa shaqqa 'alaynā dhālik*). Abū al-Ḥasan 'Alī b. 'Abī al-Karam b. 'Abdal-Wāḥid Ibn al-'Athīr, *al-Kāmil fī al-Tārikh*, ed. Abū al-Fidā' 'Abd Allāh al-Qāḍī (Beirut: Dār al-Kutub al-'Ilmiyya, 1987), vol. 3, 130, reports that the consensus, among all of the combatants in the Battle of the Camel, was to spare the lives of the fugitive, wounded and prisoner, and not to enslave people or confiscate property. But he also reports that 'Alī issued specific commands to that effect in the Battle of the Camel, and in the Battle of Ṣiffīn (37/657). Ibid., 140, 175. Zayn al-Dīn 'Umar b. Muẓaffar b. al-Wardī, *Ta'rīkh Ibn al-Wardī* (Beirut: Dār al-Kutub al-'Ilmiyya, 1996), vol. 1, 150, reports that in the Battle of Ṣiffīn 'Alī commanded his forces not to initiate the fighting, not to pursue the

booty, and whoever recognized their property should retrieve it. In an incident often cited in legal sources, 'Alī's soldiers were cooking a meal in a pot they had found, when a man from 'Ā'isha's defeated forces recognized the pot as his own. When the man demanded his pot back, 'Alī's soldiers asked him to wait until they finished cooking the food. However, the man refused to wait, spilled the food onto the ground, took his pot, and left.[101] Obviously, the story is designed to illustrate the uncompromising sanctification of the rebel's property.

The accuracy of these historical accounts is not the point.[102] Rather, the significant fact is that Muslim jurists co-opted these reports, and constructed them into precedents for their discourse on rebellion. Conflicting reports about 'Alī's conduct were largely ignored

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fugitive, not to seize property and not to molest women. Sayf b. 'Umar al-Ḍabbī al-'Asadī, *al-Fitna wa Waq'at al-Jamal*, ed. 'Aḥmad Rātib 'Armūsh (Beirut: Dār al-Nafā'is, 1993), 157, 181, reports that *ahl al-Kūfa* believed that the lives of the wounded, fugitive and prisoner should be spared, and that this was 'Alī's regular conduct. Above source also reports that both sides in Ṣiffīn agreed on these terms of conduct. 'Izz al-Dīn Abī Ḥāmid 'Abd al Ḥamīd al-Madā'inī 'Ibn 'Abī al-Ḥadīd, *Sharḥ Nahj al-Balāgha* (Beirut: Dār al-Jīl, 1987), vol. 4, 25-6; Ibid., vol. 1, 247-8, notes that 'Alī followed the example of the Prophet when the Prophet conquered Mecca in 8/630. The same point is made by al-Najafī, *Jawāhir al-Kalām*, vol. 21, 350. Often, Shī'ī sources which compare 'Alī's conduct to the case of Mecca wish to imply that the rebels against 'Alī were not actually Muslim but 'Alī opted to follow the Prophet's behaviour simply as a matter of discretion (*ta'assī*). In other words, their argument has a sectarian orientation. I address this point later. Sunnī sources such as Abū Isḥāq Ibrāhīm b. 'Alī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, n.d.), vol. 2, 283, argue that 'Alī's conduct with the Khawārij followed the example of the Prophet in dealing with the hypocrites of Medina. See also, al-Māwardī, *al-Ḥāwī*, vol. 13, 118. The same point is made by Ibn Qudāma, *al-Mughnī*, vol. 10, 60.

[101] Ibn Qudāma, *al-Mughnī*, vol. 10, 65.

[102] Hishām Ja'īṭ, *Al-Fitna* (Beirut: Dār al-Ṭalī'a, 1989), 231, argues persuasively that the reports of 'Alī's clemency are historically accurate.

or interpreted in such a fashion so that they would have a limited effect,[103] or explained away.[104] The conduct of 'Ā'isha bint Abī Bakr (d. 58/678), 'Uthmān b. 'Affān (d. 35/656), or Mu'āwiya b. Abī Sufyān (d. 60/680), for the most part, was excluded or not cited.[105] The process of selecting legal precedent, bolstering its credibility and consolidating its authoritativeness was pursued by several means. For instance, Muslim jurists often cite a report in which an 'Umayyad caliph is made to acknowledge 'Alī's precedent as a historical fact. It is reported that Marwān b. al-Ḥakam (d. 65/685) told 'Alī b. al-Ḥusayn (Zayn al-'Ābidīn) (d. 95/713): "I have never seen one more generous in victory than your father. When we were defeated in the day of the Camel [Battle of the Camel], his ['Alī's] caller shouted, do not pursue anyone who is retreating and do not kill the wounded."[106] In fact, a *ḥadīth* attributed to the Prophet was put into circulation confirming 'Alī's clemency as God's direct command. According to this report, the Prophet asked Ibn Mas'ūd (d. 33/653) whether he was aware of God's command as to the *bughā*. Ibn Mas'ūd replied that God and His Prophet know best. The Prophet then declared that the wounded, the captive, or the fugitive should not be killed.[107] 'Alī purportedly was acting in compliance with this divine command.

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[103] For conflicting reports on 'Alī's conduct, particularly in the Battle of Ṣiffīn 37/657, see Abū Bakr 'Aḥmad b. al-Ḥusayn b. 'Alī al-Bayhaqī, *Ma'rifat al-Sunan wa al-'Āthār*, ed. Sayyid Kasrawī Ḥusayn (Beirut: Dār al-Kutub al-'Ilmiyya, 1991), vol. 6, 283; al-Najafī, *Jawāhir al-Kalām*, vol. 21, 328; Abū Bakr 'Aḥmad b. 'Alī al-Rāzī al-Jaṣṣāṣ, *'Aḥkām al-Qur'ān* (Beirut: Dār al-Kitāb al-'Arabī, 1986), vol. 3, 402, reports that 'Alī killed a prisoner in the Battle of the Camel. The same is reported by al-Qāḍī Abū Ḥanīfa b. Muḥammad b. Manṣūr al-Tamīmī al-Nu'mān, *Da'ā'im al-Islām wa Dhikr al-Ḥalāl wa al-Ḥarām wa al-Qaḍāyā wa al-Aḥkām*, ed. 'Āṣif b. 'Alī Aṣghar Fayḍī (Cairo: Dār al-Ma'rifa, n.d.), vol. 1, 393-4. Al-Jamal, *Ḥāshiyat al-Jamal*, vol. 5, 117 asserts that 'Alī executed the Khawārij; the same point is made in Muḥammad b. Abī 'Abbās 'Aḥmad b. Ḥamza Ibn Shihāb al-Dīn al-Ramlī, *Nihāyat al-Muḥtāj 'ilā Sharḥ al-Minhāj fī al-Fiqh 'alā Madhhab al-'Imām al-Shāfi'ī* [published in the margins is *Ḥāshiyat al-Shabrāmalsī* and *Ḥāshiyat al-Rashīdī*] (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1968), vol. 7, 407. Abū 'Abd Allāh Muḥammad b. Mufliḥ, *Kitāb al-Furū'* (Beirut: 'Ālam al-Kutub, 1985), vol. 6, 163, argues that 'Alī took the property found in the Khawārij's camp because they usurped much more than that from Muslims. It is reported that in 38/658 Jāriyya b. Qudāmah al-Sa'dī, 'Alī's agent, crucified and burned 'Amrū b. al-Ḥaḍramī, Mu'āwiya's agent, who was sent to Baṣra to agitate against 'Alī. Some reports say that Ibn al-Ḥaḍramī was surrounded in a home and burned, i.e. he was not crucified; al-Ṭabarī, *Ta'rīkh*, vol. 5, 57-8; Ibn Ḥajar, *Fatḥ al-Bārī*, vol. 14, 522; Abū al-'Abbās Shihāb al-Dīn al-Qasṭalānī, *Irshād al-Sārī Sharḥ Ṣaḥīḥ al-Bukhārī* (Cairo: Dār al-Fikr, 1304), vol. 10, 179-80; see the discussion of this incident in 'Ibn Abī al-Ḥadīd, *Sharḥ*, vol. 4, 52-3. 'Aḥmad b. Ghānim b. Sālim al-Nafrāwī, *al-Fawākih al-Dawānī 'alā Risālat Ibn Abī Zayd al-Qayrawānī* (Beirut: Dār al-Fikr, n.d.), vol. 2, 218, reports that 'Alī burned the heretics (*al-zanādiqa*). Al-Nu'mān, *Da'ā'im*, vol. 2, 475, reports that 'Alī crucified a *muḥārib* alive for three days. Kraemer, "Apostates, Rebels and Brigands," 47, asserts that 'Alī took captive the Banū Nājiya. Ibn al-'Athīr and others report that only those who did not convert back to Islam were taken captive. See Ibn al-'Athīr, *al-Kāmil*, vol. 3, 239; al-Ṭabarī, *Ta'rīkh*, vol. 5, 65; Ya'qūb b. Ibrāhīm Abū Yūsuf, *Kitāb al-Kharāj* (Beirut: Dār al-Ma'rifa, n.d.), 67.

[104] In an interesting report, an man complains to 'Alī b. al-Ḥusayn Zayn al-'Ābidīn that 'Alī b. Abī Ṭālib, in Basra, did not follow the Prophet's example, when the Prophet conquered Mecca. 'Alī b. al-Ḥusayn became upset and said that 'Alī did, in fact, follow the Prophet's example. 'Alī gave his commander written orders not to kill the wounded, prisoner, or vanquished, and not to enslave a Muslim, but the commander did not read the orders until after the fighting started, Abū Ja'far Muḥammad b. al-Ḥasan al-Ṭūsī, *Tahdhīb al-'Aḥkām*, ed. al-Sayyid Ḥasan al-Kharsān (Beirut: Dār al-'Aḍwā', 1985), vol. 6, 154-5. On this report see, Muḥammad Bāqir al-Majlisī, *Malādh al-'Akhyār fī Fahm Tahdhīb al-Akhbār*, ed. al-Sayyid Mahdī al-Rajā'ī (Qum: Maṭba'at al-Khayyām: 1407 AH), vol. 9, 411.

[105] For example, 'Uthmān is reported to have written to his governor in Egypt to execute, amputate and crucify the rebels who laid siege to his home, but this precedent is not cited, see Abū 'Umar Khalīfa b. Khayyāṭ al-'Aṣfarī, *Ta'rīkh Ibn Khayyāṭ* (al-Najaf: Maṭba'at al-'Ādāb, 1967), vol. 1, 146; Ja'īt, *al-Fitna*, 114, and for Mu'āwiya's precedent, Ibid., 90. 'Ā'isha's faction is reported to have massacred 600 men suspected of taking part in 'Uthmān's assassination. This precedent is never cited. Ibid., 152; also see al-Ṭabarī, *Ta'rīkh*, vol. 4, 547-8. Qays b. Sa'd b. 'Ubāda, al-Ḥasan's governor over Egypt, made peace with Mu'āwiya, and abdicated his position on the condition that all liabilities for blood or property be forgiven. This precedent is very rarely cited by legal sources. For the incident, see 'Abd al-Razzāq, *al-Muṣannaf*, vol. 5, 462. 'Amrw b. al-'Āṣ, Mu'āwiya's partisan, had Muḥammad b. Abī Bakr al-Ṣiddīq, 'Alī's governor-designate for Egypt, either executed or burned alive inside the corpse of a dead donkey in 38/658; Ibn Khayyāṭ, *Tarīkh*, vol. 1, 174-175. See the discussion of this incident in Abū al-Walīd Muḥammad b. Aḥmad Ibn Rushd al-Qurṭubī, *al-Bayān wa al-Taḥṣīl wa al-Sharḥ wa al-Tawjīh wa al-Ta'līl fī al-*

Masā'il al-Mustakhraja, ed. Muḥammad Ḥajji (Beirut: Dār al-Gharb al-Islāmī, 1988), vol. 17, 559, where 'Amrw says that he simply followed the orders of Mu'āwiya.

[106] Al-Bayhaqī, *al-Sunan*, vol. 8, 181; idem, *Ma'rifa*, vol. 6, 282; Fakhr al-Dīn 'Uthmān b. 'Alī al-Zayla'ī, *Tabyīn al-Ḥaqā'iq Sharḥ Kanz al-Daqā'iq* (Medina: Dār al-Kitāb al-Islāmiyya, n.d.), vol. 3, 295; Muḥammad b. 'Alī b. Muḥammad al-Shawkānī, *Nayl al-Awṭār Sharḥ Muntaqā al-'Akhbār* (Cairo: Dār al-Ḥadīth, n.d.), vol. 7, 169; Abū Isḥāq Burhān al-Dīn b. Muḥammad b. Mufliḥ, *al-Mubdi' fī Sharḥ al-Muqni'* (Beirut: al-Maktab al-Islāmī, 1980), vol. 9, 162; Muḥammad b. 'Idrīs al-Shāfi'ī, *al-'Umm*, ed. Muḥammad Zuharī al-Najjār (Beirut: Dār al-Ma'rifa, n.d.), vol. 4, 216. The version reported in Muḥyī al-Dīn Abī Zakariyyā Yaḥyā b. Sharaf al-Nawawī, *al-Majmū' Sharḥ al-Muhadhdhab* (Beirut: Dār al-Fikr, n.d.), vol. 19, 203, states, "I have not seen one more generous with us than your father...." Abū Yūsuf, *al-Kharāj*, 214, where Hārūn al-Rashīd (149/766-193/809), the fifth 'Abbāsid caliph, asked about how war against fellow Muslims should be conducted. Al-Makkī, *Manāqib*, 184, reports that the 'Abbāsid caliph, al-Manṣūr (d. 158/775) called upon Abū Ḥanīfa (d. 150/767) to ask him about the rules of conduct in fighting fellow Muslims, and Abū Ḥanīfa cited 'Alī's precedent. For non-Sunnī sources see: Sharaf al-Dīn al-Ḥusayn b. 'Aḥmad al-Sayyāghī al-Ḥimī al-Ṣan'ānī, *Kitāb al-Rawḍ al-Naḍīr Sharḥ Majmū' al-Fiqh al-Kabīr* (Beirut: Dār al-Jīl, n.d.), vol. 4, 330; the Shī'ī, Abū Ja'far Muḥammad b. al-Ḥasan b. 'Alī al-Ṭūsī, *Tahdhīb al-'Aḥkām*, ed. al-Sayyid Ḥasan al-Kharsān (Beirut: Dār al-'Aḍwā', 1985), vol. 6, 155 reports that Marwān b. al-Ḥakam, "may God curse him", said that when "'Alī defeated us at Baṣra, he returned to people their property. Whoever presented proof, he returned [his property] to him. Who did not have proof, ['Alī] took the oath from him and returned his property. (The curse could be an addition by the copyist). On Zayn al-'Ābidīn, see Hossein Modarressi, *Crisis and Consolidation in the Formative Period of Shī'ite Islam* (Princeton: Darwin Press, 1993), 4-6.

[107] Al-Shawkānī, *Nayl al-Awṭār*, vol. 7, 169; Shams al-Dīn Muḥammad b. 'Abd Allāh al-Zarakshī, *Sharḥ al-Zarakshī 'alā Mukhtaṣar al-Khiraqī fī al-Fiqh 'alā Madhhab al-Imām 'Aḥmad bin Ḥanbal*, ed. 'Abd Allāh b. 'Abd al-Raḥmān b. 'Abd Allāh b. al-Jabrīn (Riyad: al-'Ubykān, n.d.), vol., 6, 226; Abū Muḥammad Muwaffaq al-Dīn 'Abd Allāh b. Qudāma al-Maqdisī, *al-Kāfī fī Fiqh al-'Imām 'Aḥmad b. Ḥanbal*, ed. Zuhīr al-Shāwīsh (Beirut: al-Maktab al-Islāmī, 1982), vol. 4, 148; al-Bayhaqī, *al-Sunan*, vol. 8, 182 notes that the *ḥadīth* is weak; Kamāl al-Dīn Muḥammad b. 'Abd al-Wāḥid al-Sīwāsī b. al-Humām, *Fatḥ al-Qadīr*, ed. 'Abd al-Razzāq Ghālib al-Mahdī (Beirut: Dār al-Kutub al-'Ilmiyya, 1995), vol. 6, 98,

Importantly, authentication of the discourse was sought from the Qur'ān as well. Two specific verses became integral to the discourse. Both verses, on their face, address rebellion only indirectly. The reports about the occasions for their revelation were not directly related to issues of rebellion either. We will discuss the verse on *baghy* first.

The *Baghy* Verse

The word *baghā* occurs in the Constitution of Medina (*wathīqat al-Madīna*); it is used in the sense of transgression -- the believers are to cooperate against those who transgress or commit injustice (*'alā man baghā minhum*).[108] The word is used in a non-technical fashion to signify that all Muslims will cooperate against any unjust or offending party. Nevertheless, despite its apparent significance, this precedent is hardly ever cited in Islamic legal sources. Rather, it is the Qur'ānic verse on the subject which is cited in nearly every discourse on rebellion. The verse states the following:

> "If two parties among the believers fight each other, then make peace between them. But if one of them transgresses (*baghat*) against the other, then fight, all of you, against the one that transgresses until it complies with the command of God. But if it complies, then make peace between the two parties with justice and be fair, for God loves those who are fair and just. The believers are but a single

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also notes that the *ḥadīth* is problematic. In 'Abd al-Qādir b. 'Umar al-Shaybanī and Ibrāhīm b. Muḥammad b. Ḍūwwān, *al-Mu'tamad fī Fiqh al-Imām 'Aḥmad*, ed. 'Alī 'Abd al-Ḥamīd al-Baltajī and Muḥammad Wahbī Sulaymān (Beirut: Dār al-Khayr, 1991), vol. 2, 443, the same is noted. Taqī al-Dīn Abū Bakr b. Muḥammad al-Ḥusaynī al-Ḥiṣnī al-Dimashqī, *Kifāyat al-'Akhyār fī Ḥall Ghāyat al-'Ikhtiṣār*, ed. 'Alī 'Abd Al-Ḥamīd al-Baltajī and Muḥammad Wahbī Sulaymān (Beirut: Dār al-Khayr, 1991), 493 (editors note that both the Prophet's *ḥadīth* and the report about Marwān are weak).

[108] See Riḍwān al-Sayyid, *al-'Umma*, 54; also see Watt, *Islamic Political Thought*, 131.

brotherhood. So reconcile your two [contending] brothers, and fear God so that you will receive His mercy."[109]

Significantly, the verse uses the word *baghat* which in this context means to trangress or treat unfairly.[110] This verse became commonly known as '*āyat al-baghy* or the verse on *baghy*. We will later address the reports on how the companions understood and debated this verse.[111] For now, it is important to note that on its face, the verse addresses a conflict between two seemingly equal parties. The only thing that seems to distinguish one party from the other is the offense of committing transgression. However, there is no elaboration in the verse as to the nature of the transgression. Possibly, the transgression could be the act of resorting to violence or the decision to refuse reconciliation or to continue fighting despite attempts at reconciliation. Importantly, however, on its face the verse does not seem to address a situation in which there is a hierarchy of authority. In other words, it does not seem to address a situation in which a person revolts against a superior or in which one rebels against an established government.

The reported reasons for the revelation of this verse are rather curious. There are many different reports on why this verse was revealed.[112] In one report, a woman from the 'Anṣār, identified only as 'Umm Zayd, was forbidden by her husband from visiting her parents. When the woman insisted on visiting her family, the husband imprisoned her. Consequently, her family and his family quarreled, and continued to fight until the verse was revealed.[113] Another report states that the Prophet was riding a donkey and passed by 'Abd Allāh b. 'Ubayy b. Salūl of al-Khazraj (known as the head of the hypocrites). When the Prophet's donkey defecated, Ibn 'Ubayy plugged his nose and yelled out: "Take your donkey away; its odor has hurt us." 'Abd Allāh b. Rawāḥa of al-'Aws, who was standing nearby, was angered and yelled back: "The Prophet's donkey smells better than you and your father." The supporters of each started arguing, and the argument descended into fighting in which fists and shoes were used. Some versions of this report add that the Prophet interceded to stop the fighting but both parties were not open to reconciliation (*fa karihu dhālik*), and so the verse was revealed.[114] Some reports add that weapons were used in the fighting.[115] A variant of this story, involves Muslims and non-Muslims. The same facts about the Prophet's donkey, and Ibn 'Ubayy's displeasure with the donkey's odor are presented. However in this version, the incident is said to have taken place before the Battle of Badr 2/624. Ibn 'Ubayy was sitting with unbelievers and Jews when the Prophet came to invite them to Islam. Ibn 'Ubayy rudely told the Prophet not to disturb their social event, and that the Prophet should wait at home where those who wished to listen might seek him. After Ibn Rawāḥa retorts by inviting the Prophet to come talk to him, and declaring that he would be more than happy to listen to the Prophet preach, Muslims, Jews and unbelievers quarreled with each other until the Prophet intervened.[116] In yet another report, the reason for revelation is said to be very different. In this version, two men from the 'Anṣār fought. Due to the fact that one of the men belonged to a powerful clan, he proclaimed that if need be the dispute will be settled by force, but the other man insisted that they should go to the Prophet and mediate the matter. They continued to argue until they fought using their hands and shoes.[117]

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[109] Qur'ān 49:9-10. I have consulted *The Meaning of The Holy Qur'ān*, trans. Abdullah Yusuf Ali (Beltsville, Md.: Amana Publications, 1995), however, I translated from the original Arabic.

[110] The Qur'ān typically uses the word baghy to mean transgression or injustice. For instance: "Say: God has forbidden shameful deeds, whether open or secret; sins and transgression (*baghy*) against truth or rights; assigning partners to God, for which God hath given no authority; and saying things about God of which you have no knowledge." 7:33. Also see 2:90; 2:213; 2:173; 3:19; 6:146; 6:145; 10:23; 10:90; 16:90; 42:14; 42:39; 45:17; 96:115. The Qur'ān also uses the term to mean sexual transgression, see 19:20; 19:28; 24:33.

[111] For example, as discussed later, there are reports in which 'Ā'isha, 'Abd Allāh b. 'Umar, and others lament the fact that this verse has been ignored or misapplied.

[112] These types of reports are called the occasions for revelation, or '*asbāb al-nuzūl*.

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[113] Jalāl al-Dīn al-Suyūṭī, *al-Durr al-Manthūr fī al-Tafsīr bi al-Ma'thūr* (Cairo: Maṭba'at al-Anwār al-Muḥammadiyya, n.d.), vol. 6, 99; Abū al-Faḍl Shihāb al-Dīn al-Sayyid Maḥmūd al-'Ālūsī, *Rūḥ al-Ma'ānī fī Tafsīr al-Qur'ān al-'Aẓīm wa al-Sab' al-Mathānī* (Beirut: Dār 'Iḥyā' al-Turāth al-'Arabī, 1985), vol. 26, 151. A slightly different version appears in Abū Muḥammad Ismā'īl b. 'Abd al-Raḥmān al-Suddī al-Kabīr, *Tafsīr al-Suddī al-Kabīr*, ed. Muḥammad 'Aṭā Yūsuf (Riyad: Dār al-Wafā', 1993), 442; he reports that there was some problem between the woman and her husband, so he imprisoned her. Consequently, his and her families fought each other but the Prophet intervened and reconciled them. It seems that this report emerged early on because al-Suddī died 128/745. This report does not appear in Muqātil b. Sulaymān, *Tafsīr al-Qur'ān*, MS Saray Ahmet III, 74/II, 163. Muqātil died 150/767.

[114] Al-'Ālūsī, *Rūḥ*, vol. 5, 330; Abū Ja'far Muḥammad b. Jarīr al-Ṭabarī, *Jāmi' al-Bayān fī Tafsīr al-Qur'ān* (Beirut: Dār al-Ma'rifa, 1989), vol. 25, 82; 'Imād al-Dīn Abū al-Fidā' b. 'Umar Ibn Kathīr, *Tafsīr al-Qur'ān al-'Aẓīm* (Beirut: Dār al-Khayr, 1990), vol. 4, 222; 'Abd al-Raḥmān b. Muḥammad b. Makhlūf al-Tha'ālibī, *al-Jawāhir al-Ḥisān fī Tafsīr al-Qur'ān* (Beirut: Mu'assasat al-'A'lamī li al-Maṭbū'āt, n.d.), vol. 4, 188. 'Athīr al-Dīn Muḥammad b. Yūsuf Abī Ḥayyān al-'Andalusī, *Tafsīr al-Nahr al-Mādd min al-Baḥr al-Muḥīṭ* (Beirut: Dār al-Jinān, n.d.), vol. 2, pt. 2, 979, states only that the Prophet was on his way to visit an ill companion when Ibn 'Ubayy verbally assaulted him. 'Abd Allāh b. 'Aḥmad al-Nasafī, *Tafsīr al-Nasafī: Madārik al-Tanzīl wa Ḥaqā'iq al-Ta'wīl*, ed. Marwān Muḥammad al-Shi'ār (Beirut: Dār al-Nafā'is, 1996), vol. 3, 1678, adds to the story in the text above: "the urine of the Prophet's donkey smells better than your musk." Substantially, the same report is in Muqātil, *Tafsīr*, 74/II, 163 except that the fight breaks out after the Prophet leaves. The early *tafsīr* of 'Abd al-Razzāq al-Ṣan'ānī (d. 211/826) reports that two Muslim groups fought using their hands and shoes, so the verse was revealed, Abū Bakr 'Abd al-Razzāq al-Ṣan'ānī, *Tafsīr al-Qur'ān al-'Azīz* (Beirut: Dār al-Ma'rifa, 1991), vol. 2, 188. Some reports simply state, without further elaboration, that two tribes from the 'Anṣār fought and so the verse was revealed, see Quṭb al-Dīn Sa'īd b. Hibat Allāh al-Rāwandī, *Fiqh al-Qur'ān*, ed. al-Sayyid 'Aḥmad al-Ḥusaynī (Qum: Maṭba'at al-Wilāya, 1405), vol. 1, 372. Other reports simply state that the verse was revealed when the 'Aws and Khazraj fought, see Muḥsin al-Fayḍ al-Kāshānī, *Tafsīr al-Ṣāfī* (Beirut: Mu'assasat al-A'lamī, 1982), vol 5, 50; Abū Sa'īd 'Abd Allāh b. 'Umar b. Muḥammad al-Shīrāzī al-Bayḍāwī, *'al-Tanzīl wa 'Asrār al-Ta'wīl* (Beirut: Mu'assasat Sha'bān, n.d.), vol. 5, 88. One report involves murder. According to this report, Sumayr killed Ḥāṭib, and then the 'Aws and Khazraj fought because of this incident; Abū 'Abd Allāh Muḥammad b. 'Aḥmad al-'Anṣārī al-Qurṭubī, *al-Jāmi' li 'Aḥkām al-Qur'ān* (Cairo, 1952), vol. 16, 316-7.

[115] Abū 'Alī al-Faḍl b. al-Ḥasan al-Ṭabrisī, *Majma' al-Bayān fī Tafsīr al-Qur'ān* (Beirut: Dār Maktabat al-Ḥayāt, n.d.), vol. 6, 88. The significance of the point about the use of weaponry is that some of 'Alī's

These reports might represent various trends in early Islam that sought to establish the authoritativeness of the Prophet's role. However, none of them relate directly to the issue of rebellion or insurrection. The tenuous relationship between the verses on *baghy* and the law of rebellion, as discussed later, is noted by several, particularly Shī'ī,

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detractors argued that weaponry should never be used in inter-Muslim fighting. Relying on the reports that state that the 'Anṣār used their hands and shoes, they argued that only hands and perhaps sticks or rocks, may be used. The point of this report is to criticize 'Alī's use of weaponry against fellow Muslims. See al-Ṭabarī, *Jāmi' al-Bayān fī Tafsīr al-Qur'ān*, vol. 25, 82; Abū Bakr 'Aḥmad b. 'Alī al-Rāzī al-Jaṣṣāṣ, *'Aḥkām al-Qur'ān* (Beirut: Dār al-Kitāb al-'Arabī, 1986), vol. 3, 400.

[116] 'Aḥmad al-Ṣāwī, *Ḥāshiyat al-'Allāma al-Ṣāwī 'alā Tafsīr al-Jalālayn* (Beirut: Dār 'Iḥyā' al-Turāth al-'Arabī, n.d.), vol. 4, 110-1.

[117] Some versions of the report are careful to note that no weapons were used; al-Suyūṭī, *al-Durr*, vol. 6, 99; al-Jaṣṣāṣ, *'Aḥkām*, vol. 3, 399; Abū al-Ḥasan 'Alī Muḥammad b. Ḥabīb al-Māwardī, *al-Nukat wa al-'Uyūn* (Beirut: Dār al-Kutub al-'Ilmiyya, 1992), vol. 5, 330; al-Ṣan'ānī, *Tafsīr*, vol. 2, 188; al-Ṭabarī, *Jāmi'*, vol. 25, 81-82, also reports that, as a general matter, the verse was revealed because parties would fight, and the Prophet would invite them to an arbitration, but they would refuse.

scholars.[118] Even Sunnī jurists frequently point out that the term *baghy* used in language is different from the technical meaning given to it in law.[119]

The historical, but not necessarily the legal, connection between the *baghy* verse and rebellion was made through the problem of *fitna*. By *fitna*, we mean the civil strife that exploded at the time of the assassination of 'Uthmān, and the ensuing warfare between 'Alī and his opponents. There are several reports, not necessarily all Shī'ī, that assert that this verse was revealed to address the *fitna* between the companions of the Prophet. According to these reports, upon the revelation of this verse, the Prophet informed one of his esteemed companions, 'Ammār b. Yāsir (d. 37/657), that he ('Ammār) would be killed by the unjust group (*al-firqatu* or *al-fi'atu al-bāghiya*).[120] 'Ammār was a long time partisan of 'Alī, and was killed fighting Mu'āwiya in the Battle of Ṣiffīn.[121] The implication of this report was that Mu'āwiya, being the *bāghī* -- the unjust or aggressor -- should have been fought, and that 'Alī should have been supported.[122]

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[118] For example, see Jamāl al-Dīn al-Miqdād b. 'Abd Allāh al-Suyūrī, *Kanz al-'Irfān fī Fiqh al-Qur'ān*, ed. Muḥammad Bāqir al-Bihbūdī (Tehran: al-Maktaba al-Murtaḍawiyya, n.d.), vol. 1, 386, who notes that the *bughā* in the verse are not necessarily the *bughā* addressed by the jurists. The late Shī'ī jurist, al-Sayyid Muḥammad Ḥusayn al-Ṭabāṭabā'ī, *al-Mīzān fī Tafsīr al-Qur'ān* (Qum: Maṭba'at Ismā'īliyyān, 1412 AH), vol. 18, 320, notes that considering the reports on the occasions for revelation, it is not clear why the verse applies to rebellion. Al-Bayhaqī, *al-Sunan*, vol. 6, 278-9, points out that the implications of the verse are not clear.

[119] For example, al-'Ayīnī, *al-Bināya*, vol. 6, 735; al-Zayla'ī, *Tabyīn*, vol. 3, 293. As noted above, the Qur'ān uses the term in its common sense which means transgression or exceeding the bounds.

[120] 'Imād al-Dīn b. Muḥammad al-Ṭibā'ī al-Kiyā al-Harrāsī, *'Aḥkām al-Qur'ān* (Beirut: Dār al-Kutub al-'Ilmiyya, 1985), vol. 4, 382. Al-Jaṣṣāṣ, *'Aḥkām*, vol. 3, 400, argues that the 'Ammār *ḥadīth* is so firmly established in the Islamic tradition that even Mu'āwiya could not deny its authenticity. Mu'āwiya is reported to have argued that he did not kill 'Ammār. Rather, those who killed 'Ammār were the ones who brought him to battle and threw him upon our spears, i.e. 'Alī and his followers are themselves responsible; al-Bayhaqī, *al-Sunan*, vol. 8, 189. Ibn 'Arabī, *'Aḥkām*, vol. 4, 1717, reports that the verse was revealed to address the Khawārij. Muḥyī al-Dīn b. 'Arabī, *Tafsīr al-Qur'ān al-Karīm*, ed. Muṣṭafā Ghālib (Beirut: Dār al-Andalus, n.d.), vol. 2, 519-520, asserts that 'Ammār fought Mu'āwiya so that people would know that Mu'āwiya was the *bāghī*; but there is some question as to real author of this work. Al-'Āmilī, *Wasā'il*, vol. 11, 17, reports that when the verse was revealed, the Prophet predicted that 'Alī would fight pursuant to a sound interpretation, in the same fashion that the Prophet fought pursuant to a sound revelation; see also, al-Ṣāfī, *Tafsīr*, vol, 5, 50-51.

[121] See the article, "'Ammār," by H. Reckendorf in the *Encyclopedia of Islam*, ed. M. Th. Houtsma et al., 1st ed. (Leiden: E.J. Brill, 1913-36), vol. 1, 333-4.

[122] It is this implication that motivated Ibn Taymiyya to raise doubts about the authenticity of that *ḥadīth*. Ibn Taymiyya also argues that even if the *ḥadīth* is authentic, some argue that the expression, *al-firqa al-bāghiya*, used in the *ḥadīth* meant the group that sought (*tabghī*) redress for 'Uthmān's blood, but

Contextually, the existence of this report is hardly surprising. The verse on *baghy* seems to have played a substantial role in the early polemics in the *fitna* between the companions of the Prophet. The caliph 'Uthmān and Mu'āwiya were accused of being *bughā* by their detractors.[123] Furthermore, the Khawārij accused 'Alī of ignoring the injunctions of the verse by accepting the arbitration (*taḥkīm*) with Mu'āwiya.[124] In fact, it seems that the accusations of *baghy* and being a *bāghī* were freely traded between the supporters of 'Alī and his opponents.[125] Perhaps the most interesting aspect of these

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not the unjust or transgressing group. Even if the *ḥadīth* is referring to the unjust group, then it meant to condemn the specific combatants that actually committed the killing, not Mu'āwiya. Ibn Taymiyya also adds that Mu'āwiya and his supporter, 'Amrw b. al-'Āṣ, disapproved of 'Ammār's death; Abū al-'Abbās Taqī al-Dīn 'Aḥmad Ibn Taymiyya, *al-Fatāwā al-Kubrā*, eds. Muḥammad 'Abd al-Qawī 'Aṭā and Muṣṭafā 'Abd al-Qawī 'Aṭā (Cairo: Dār al-Diyān al-Turāth, 1988), vol. 3, 456, 458. There is a vast amount of apologetic literature discussing the issue of the *fitna* between the companions, and vindicating all the companions including 'Alī and Mu'āwiya. Many sources assert that 'Alī was the true *'imām* and that Mu'āwiya was a *bāghi*; see for example, Ibn al-'Arabī, *'Aḥkām*, vol. 4, 1717; Abū al-Walīd Ibn Rushd al-Qurṭubī, *al-Bayān wa al-Taḥṣīl wa al-Sharḥ wa al-Tawjīh wa al-Ta'līl fī Masā'il al-Mustakhraja*, ed. Muḥammad Ḥajjī (Beirut: Dār al-Gharb al-Islāmī, 1988), vol. 16, 361, vol. 18, 175-77; Muḥammad b. Ibrāhīm al-Wazīr al-Yamānī, *al-'Awāṣim wa al-Qawāṣim fī al-Dhabb 'an Sunnat Abī al-Qāsim* (Beirut: Mu'assasat al-Risala, 1992), vol. 8, 20-1, 82. 'Alā' al-Dīn Abī Bakr b. Mas'ūd al-Kāsānī, *Kitāb Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* (Beirut: Dār al-Kutub al-'Ilmiyya, 1986), vol. 7, 140. We will have an occasion to discuss many of the arguments of this genre of literature in the context of reviewing the positions of various jurists.

[123] Abū Ya'qūb Yūsuf b. Ibrāhīm al-Warjalānī, *al-'Adl wa al-'Inṣāf fī Ma'rifat 'Uṣūl al-Fiqh wa al-Ikhtilāf* (Oman: Wizārat al-Turāth, 1983), vol. 2, 44-45; al-Wazīr, *al-'Awāṣim*, vol. 8, 82; Ja'īṭ, *al-Fitna*, 210-13.

[124] 'Aḥmad b. 'Abī Ya'qūb b. Ja'far b. Wāḍiḥ al-Ya'qūbī, *Ta'rīkh al-Ya'qūbī* (Beirut: Dār Ṣādir, n.d.), vol. 2, 191-2; Abū al-Ḥasan 'Alī b. Ismā'īl al-'Ash'arī, *Maqālāt al-Islāmiyyīn wa Ikhtilāf al-Muṣallīn*, ed. Muḥammad Muḥyī al-Dīn 'Abd al-Ḥamīd (Beirut: al-Maktaba al-'Aṣriyya, 1990), vol. 2, 141.

[125] 'Abd al-Razzāq, *al-Muṣannaf*, vol. 10, 122; 'Abd al-Ḥusayn 'Aḥmad al-'Amīnī al-Najafī, *al-Ghadīr fī al-Kitāb wa al-Sunna* (Beirut: Dār al-Kitāb al-'Arabī, 1983), vol. 10, 291, 320, 325, 342. The Mu'tazilī al-Ḥākim Abū Sa'd al-Muḥsin b. Muḥammad b. Karāmah al-Bayhaqī, *Risālat 'Iblīs 'ilā Ikhwānihi al-Manāhīs*, ed. Ḥusayn al-Mudarrisī al-Ṭabāṭabā'ī (1986), 98, calls Mu'āwiya *bāghin ḍāl*. For the polemics between 'Alī and Mu'āwiya, see, 'Ibn Abī al-Ḥadīd, *Sharḥ*, vol. 4, 13-26. See 'Aḥmad b. Yaḥyā Ibn al-Murtaḍā, *Kitāb al-Baḥr al-Zakhkhār al-Jāmi' li Madhāhib 'Ulamā' al-Amṣār* (Cairo: Dār al-Kitāb al-Islamī, n.d.), vol. 6, 379, for Karrāmiyya's view that al-Ḥusayn b. 'Alī (d. 61/680) was a *bāghī*. On the Karrāmiyya, see Abū al-Fatḥ Muḥammad b. 'Abd al-Karīm b. Abī Bakr 'Aḥmad al-Shahrastānī, *al-Milal wa al-Niḥal*, ed. 'Amīr 'Alī Muhannā and 'Alī Ḥasan Fā'ūr (Beirut: Dār al-Ma'rifa, 1992), vol. 1, 124-131; D. S. Margoliouth, "Karrāmīya," in *Encyclopedia of Islam*, 1st ed., vol. 4, 773-4. See also, al-Ṭabarī, *Ta'rīkh*, vol. 5, 138, where Mu'āwiya's opponents are called *bughā*.

In an interesting report which demonstrates the complex subtleties and negotiative nature of this discourse, Mu'āwiya reportedly ordered al-'Aḥnaf b. Qays to curse 'Alī; al-'Aḥnaf refused to do so. Instead he cursed whichever party committed *baghy* (*al-fi'a al-bāghiyya*). This implies that Mu'āwiya was the transgressing and unjust party; Abū al-'Abbās Shams al-Dīn 'Aḥmad b. Muḥammad b. Abī Bakr b. Khallikān, *Wafayāt al-'A'yān wa 'Anbā' al-Zamān*, ed. 'Iḥsān 'Abbās (Beirut: Dār Ṣādir, n.d.), vol. 2, 505. Also see Ibn al-Wardī, *Ta'rīkh*, vol. 1, 168.

polemics are the genre of reports in which 'Ā'isha, 'Abd 'Allāh b. 'Umar, and even Mu'āwiya lament the fact that the verse on *baghy* had been neglected and ignored.

'Abd Allāh b. 'Umar (d. 73/693) had remained strictly neutral during the political turmoils of his time.[126] He is reported to have refused to join 'Alī or any of the rebellions after 'Alī's death. In the Battle of Ḥarra in 63/683[127] between the Medinese and Yazīd (d. 64/683), he is reported to have said, "We are with whoever wins (*naḥnu ma'a man ghalab*)."[128] It does appear that 'Ibn 'Umar adapted well to living under the 'Umayyads, and even to have gained their trust. For instance, after defeating 'Abd Allāh b. al-Zubayr (d. 73/692) in Mecca, the caliph 'Abd al-Malik b. Marwān (d. 86/705) is said to have commanded al-Ḥajjāj (d. 95/714) to lead a convoy of pilgrims to Mecca. Importantly, the Caliph also instructed al-Ḥajjāj to defer to 'Ibn 'Umar on all matters relating to the rites of pilgrimage.[129] Nevertheless, despite 'Ibn 'Umar's apparent cooperation with the 'Umayyads, he is quoted as saying, "Nothing has pained me as much as the fact that I have not fought against the *bāghiya* group (*al-firqatu al-baghiya*) as God has commanded me to do."[130] However, there is no agreement as to what 'Ibn 'Umar meant by this statement. According to one report, 'Ibn 'Umar sincerely regretted not fighting on 'Alī's side against all of 'Alī's foes.[131] In another report, 'Ibn 'Umar was asked which of the groups he considered to be *bāghiya*; he said that it was 'Ibn al-Zubayr because 'Ibn al-Zubayr violated his oath of allegiance to the 'Umayyads.[132] In yet another report, when al-Ḥajjāj defeated Mecca, Ibn 'Umar asserted that he did not know the just from the unjust party *(al-bāghiya min al-mabghī 'alayhā)*, but if he did, no one would surpass him in upholding the commands of the verse. In other words, if only he could ascertain whether al-Ḥajjāj or the rebels of Mecca were right, he would not hesitate to join the fight.[133] In all probability, more than anything else, the various versions simply display the allegiances of the transmitters of the reports.

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[126] See K. V. Zettersteen, "'Abd Allāh ibn 'Umar," in *Encyclopedia of Islam*, 1st ed., vol. 1, 28.

[127] See Muḥammad b. Khalīfa al-Washtānī al-'Ābī, *Sharḥ Ṣaḥīḥ Muslim* (Beirut: Dār al-Kutub al-'Ilmiyya, 1994), vol. 6, 558-561.

[128] Badr al-Dīn b. Jamā'a, *Taḥrīr al-Aḥkām fi Tadbīr 'Ahl al-Islām*, ed. Fu'ād 'Abd al Mun'im 'Aḥmad (Qaṭr: al-Shu'ūn al-Dīniyya, 1985), 55. When asked, if two rulers fight, with whom should people pray *jum'a*, he is reported to have said, "With whoever wins (*ma'a manghalab*)"; Abū Ya'lā, *al-Aḥkām*, 22. Ibn 'Umar figures prominently in the anti-*fitna* traditions. He is often quoted as counseling against disobedience or rebellion; See al-Nawawī, *al-Majmū'*, vol. 19, 190; al-Bayhaqī, *al-Sunan*, vol. 8, 192-3; al-Qasṭalānī, *'Irshād*, vol. 10, 199; Abū Muḥammad Maḥmūd b. 'Aḥmad al-'Ayīnī, *'Umdat al-Qārī Sharḥ Ṣaḥīḥ al-Bukhārī* (Beirut: Dār al-Fikr, n.d.), vol. 24, 209. 'Ibn 'Umar is also reported to have opposed 'Ibn al-Zubayr's rebellion; for example, see al-'Ābī, *Sharḥ*, vol. 6, 557, 563-4.

[129] Ibn Taymiya, *Minhāj al-Sunna al-Nabawiyya* (Beirut: al-Maktaba al-'Ilmiyya, n.d.), vol. 2, 255.

[130] Al-Suyūṭī, *al-Durr*, vol. 6, 99.

[131] Al-'Ālūsī, *Rūḥ*, vol. 26, 151; Abū al-Qāsim Maḥmūd b. 'Umar al-Zamakhsharī al-Khawārizmī, *al-Kashshāf* (Beirut: Dār al-Ma'rifa, n.d.), vol. 4, 11. In fact, it is reported that on his deathbed Ibn 'Umar said that he regretted nothing more than not supporting 'Alī; Ibn Mufliḥ, *Kitāb*, vol. 6, 153-4. In al-

In a different genre of reports 'Ā'isha, the Prophet's wife and one of the rebels against 'Alī, lamented that the whole nation *('umma)* had neglected or ignored the verse.[134] Nonetheless, while, arguably, the report refers to *fitna* at the time of 'Alī, it is not at all clear what is intended by the statement.[135] Ibn Rushd I (d. 520/1122), for example,

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'Ayīnī, *'Umda*, vol. 24, 192, Ibn 'Umar expresses the same regret but cites a promise given to his father as the reason for not being able to support 'Alī. See also 'Abd Allāh b. Muḥammad b. Abī Shayba, *al-Muṣannaf fī al-Aḥādīth wa al-'Āthār*, ed. Sa'īd Muḥammad al-Laḥḥām (Beirut: Dār al-Fikr, 1989), vol. 8, 723 where Ibn 'Umar (incorrectly printed in the source as Ibn 'Amrw) informs Mu'āwiya that he was on his side but cited his father as the reason for his inability to fight. Interestingly, there is a report that 'Amrw b. al-'Āṣ joined Mu'āwiya because 'Amrw's father ordered him to, and he had to obey his father, Ibn Rushd I, *al-Bayān*, vol. 17, 240-3. Al-Qaḍī Nu'mān reported that 'Alī cut off 'Ibn 'Umar's financial grant because of his failure to support him ('Alī). 'Ibn 'Umar then told 'Alī that he regretted nothing more than not supporting him. After 'Alī's son al-Ḥasan interceded on Ibn 'Umar's behalf, his grant was restored. Al-Qaḍī Nu'mān, *Da'ā'im*, vol. 1, 391-2.

[132] Al-Bayhaqī, *al-Sunan*, vol. 8, 172; al-'Asqalānī, *Fatḥ*, vol. 14, 577.

[133] Al-Suyūṭī, *al-Durr*, vol. 6, 99.

[134] Al-Bayhaqī, *al-Sunan*, vol. 8, 173; al-Amīnī, *al-Ghadīr*, vol. 10, 275, takes a "stab" at 'Ā'isha by asserting that she, herself, was one of the people who ignored the verse by rebelling against 'Alī.

[135] Arguably, the report refers to the killing of the 'Uthmān, and to the fact that 'Ā'isha believed that 'Alī's caliphate was illegitimate because, in her view, it developed from this murder. Therefore, 'Ā'isha is lamenting the fact that people failed to support or protect 'Uthmān. However, Muslim jurists, including Ibn Rushd, give this tradition a much broader meaning. In some reports 'Ā'isha appears critical to Mu'āwiya. For instance, in one such report, after hearing of the terrible fate that befell Muḥammad b. Abī Bakr (see footnote 99 on the incident), 'Ā'isha proclaims that what Mu'āwiya did to Muḥammad was not going to deter her from speaking the truth, al-'Ābī, *Sharḥ*, vol. 6, 513. The implication is that she would speak the truth against Mu'āwiya and his faction despite their cruelty against their opponents. No elaboration is provided on this report, and it seems that after 'Ā'isha was defeated in the Battle of the Camel, she lived a quiet apolitical life except, perhaps, for an incident when al-Ḥasan, 'Alī's son, died. On 'Ā'isha, see M. Seligsohn, "'Ā'isha," in *Encyclopedia of Islam*, 1st ed., vol. 1, p. 216; D. A. Spellberg, *Politics, Gender and the Islamic Past: The Legacy of Aisha Bint Abi Bakr* (New York: Columbia University Press, 1994).

struggles with the meaning of the report centuries after its circulation.[136] However, his interpretation, as argued later, reflects a developed position indicative of his own era. In an even more ambiguous report, after 'Alī's death, Mu'āwiya chides Sa'd b. Abī al-Waqqās (d. 50 or 55/670-1 or 674-5)[137] for failing to comply with the verse during the *fitna*. Mu'āwiya tells Sa'd, "You were not among those who reconciled between the fighting factions, nor did you fight the iniquitous party [as the verse commands]." Sa'd replies, "Yes, I regret not fighting against the iniquitous party!"[138] The question becomes: is Sa'd apologizing for not fighting 'Alī, Mu'āwiya, 'Ā'isha or al-Khawārij? It is quite possible that the report intends to blame Sa'd for his silence during the revolt against 'Uthmān. In other words, Mu'āwiya could be criticizing Sa'd for his failure to defend 'Uthmān against the revolt which ultimately led to 'Uthmān's murder.[139] Importantly, however, Sa'd report is discussed by Sunnī jurists in the context of addressing the rebellions against 'Alī, and not the rebellion against 'Uthmān.

The historicity, or lack thereof, of these reports is not the point. The point is that these reports provide clues as to how a verse that could possibly have been revealed to address a domestic dispute or a street brawl, became co-opted and reconstructed to serve as the basis for a juristic discourse on rebellion. Early Muslims saw a connection or nexus between the verse and the tribulations plaguing the companions. The terminology of the Qur'ān was, in turn, co-opted and applied to this specific historical setting. A debate raged on as to whether a certain faction or another was intended by the term "*bāghiya*" or whether reconciliation or fighting was necessary. Some even argued that 'Alī should not have fought any of those who rebelled against him, and should have followed 'Uthmān's example in sitting passively at home and allowing himself to be killed.[140]

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[136] Ibn Rushd I, *al-Bayān*, vol. 16, 359-60.

[137] Sa'd was one of the Prophet's close companions. He refused to support either 'Alī or Mu'āwiya and withdrew to his estate in al-'Aqīq. See K.V. Zettersteen, "Sa'd," in *Encyclopedia of Islam*, 1st ed., vol. 7, p. 29-30.

[138] Ibn al-'Arabī, *'Aḥkām*, vol. 4, 1719; al-Qurṭubī, *al-Jāmi'*, vol. 16, 319.

[139] It is unlikely that the report meant al-Khawārij since it seems that in early Islam they were referred to as *al-firqa al-māriqa* and not *al-firqa al-bāghiyya*. Furthermore, both Mu'āwiya and Sa'd were not in the vicinity of Kūfa at the time of rebellion by the Khawārij.

But this debate became the platform on which the discourse on rebellion was established. As pointed out earlier, some jurists went so far as to say that the sole reason God made the companions fight each other was to teach Muslims the law of rebellion. Fundamentally, the discourse on the fighting between the companions of the Prophet was a discourse on theology, on rehabilitating the Prophet's legacy, and on establishing the basis of the Islamic creed. For Sunnī Muslims in particular, the primary concern was to preserve or salvage the credibility of all the companions despite the quarreling and fighting.[141] This involved an intricate process of creative apologetics in which it was argued, among other things, that all the companions were correct to a certain extent, but 'Alī was more correct than the others. The companions were all exercising an *'ijtihād* (independent judgment), and all would be rewarded by God. However, 'Alī's position was, ultimately, more justified than any of his opponents. All of the companions would in the end, go to heaven.[142] Alternatively, an argument was constructed that one must not judge who from among the companions was wrong or right, therefore one must abstain from judgment and leave the matter to God to sort out at the end.[143]

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[140] 'Abd al-Raḥmān b. Muḥammad b. Qāsim al-'Āṣimī al-Najdī, *Ḥāshiyat al-Rawḍ al-Murbi' Sharḥ Zād al-Mustanqi'* (Riyad, 1410 AH), vol. 7, 386; Manṣūr b. Yūnis 'Idrīs al-Bahūtī, *Kashshāf al-Qinā' 'an Matn al-Iqnā'*, ed. Hilāl Muṣilḥī Muṣṭafā Hilāl (Beirut: Dār al-Fikr, 1982), vol. 6, 155-6.; Ibn Mufliḥ, *al-Mubdi'*, vol. 9, 155; Ibn 'Arabī, *'Aḥkām*, vol. 4, 1717; Ibn Kathīr, *Tafsīr*, vol. 2, 53-4, reports that Abū Hurayrah tried to defend 'Uthmān but 'Uthmān refused his help, telling him that whoever kills one person, it is as if he has killed humanity. This is in reference to the Qur'ānic verse 5:32. The Shī'ī source, Abū Ja'far Muḥammad b. al-Ḥasan b. 'Alī al-Ṭūsī, *al-Mabsūṭ fī Fiqh al-Imāmiyya*, ed. al-Sayyid Muḥammad Taqī al-Kashafī (Tehran: al-Maktabah al-Murtaḍawiyya, 1387 AH), vol. 7, 279, mentions that 'Uthmān had 400 armed slaves. He commanded them not to defend him, and in fact, offered to free any slave who would put down his weapon.

[141] For example, see al-'Ash'arī, *Maqālāt*, vol. 2, 145-147; 'Abd al-Qāhir b. Ṭāhir b. Muḥammad al-Baghdādī, *al-Farq bayn al-Firaq* (Beirut: Dār al-Kutub al-'Ilmiyya, n.d.), 280-1; Abū Muḥammad al-Yamanī, *'Aqā'id al-Thalātha wa al-Sab'īna Firqa*, ed. Muḥammad b. 'Abd Allāh Zarbāb al-Ghāmidi (Medina: Maktabat al-'Ulūm wa al-Ḥikam, 1414 AH), vol. 1, 95-213, for his passionate defense of Abū Bakr, 'Umar, 'Uthmān, 'Alī, 'Ā'isha, Ṭalḥa and Zubayr.

[142] For example, see Ibn Abī Shayba, *al-Muṣannaf*, vol. 8, 722-23; Ibn al-'Arabī, *'Aḥkām*, vol. 4, 1718, 1719; Ibn al-Humām, *Fatḥ*, vol. 6, 97.

Whatever the merits of the apologetics, the historical memory of the early warfare between the companions produced a strong tradition of what can be called anti-*fitna* (civil strife) literature. *Fitna* was associated early on with anarchy and chaos (*al-haraj*) or corruption (*al-'ifsād fī al-arḍ*), and was condemned in this genre of literature in the strongest terms.[144] The duty of a Muslim during a *fitna*, according to the tradition, is to abstain or refrain from participating, and to avoid supporting civil turmoil or strife.[145] Therefore, it is argued that the companions, who refused to participate and who refused to support either 'Alī or his opponents were not blameworthy.[146] It is important to note, however, that this was not a unitary discourse. In other words, this was not a discourse of political pacificity alone, for after all, 'Alī, 'Ā'isha and their supporters did take part in the civil war, and their credibility had to be upheld as well.

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[143] For the various views, see al-'Ash'arī, *Maqālāt*, vol. 2, 140-142, 145-146. For the various views from a Shī'ī perspective, see al-Shaykh al-Mufīd Abī 'Abd Allāh Muḥammad b. Muḥammad, Ibn al-Nu'mān, Ibn al-Mu'allim al-'Ukbarī, *'Awā'il al-Maqālāt*, ed. al-Shaykh Ibrāhīm al-Anṣārī (n.p.: al-Mu'tamar al-'Ālamī, 1413 AH), 42-44; also see al-Sharīf al-Murtaḍā Abū al-Qāsim 'Alī b. al-Husayn al-Mūsawī, *al-Intiṣār*, ed. al-Sayyid Muḥammad Riḍā al-Sayyid Ḥasan al-Kharsān (Beirut: Dār al-Aḍwā', 1985), 232, for criticism of what he describes as the *ahl al-ḥadīth* position. (In this context *ahl al-ḥadīth* means the Sunnīs.) For criticism from a Mu'tazilī perspective, see al-Bayhaqī, *Risālat 'Iblis*, 98.

[144] Riḍwān al-Sayyid, *Mafāhīm al-Jamā'āt fī al-Islām* (Beirut: Dār al-Tanwīr, 1983), 40-1; Abū 'Amrw 'Uthmān b. Sa'īd al-Muqrī al-Dānī, *al-Sunan al-Wāridah fī al-Fitan wa Ghawā'ilihā wa al-Sā'ah wa 'Ashrāṭihā*, ed. Riḍā' Allāh b. Muḥammad 'Idrīs al-Mubārkafūrī (Riyad: Dār al-'Āṣimah, 1995), vol. 1, 211-240; 'Ibn Abī al-Ḥadīd, *Sharḥ*, vol. 10, 47.

[145] The terminology usually used is *'ittqā'* or *'i'tizāl al-fitna* or *al-'i'rāḍ 'an mā shajara baynahum*. This genre of literature is quite extensive. See, for example, Abū 'Abd Allāh Nu'aym b. Ḥammād al-Marwazī, *Kitāb al-Fitan*, ed. Suhayl Zakkār (Beirut: Dār al-Fikr, 1993), 78-99, 103-109; al-Muqrī, *al-Sunan*, vol. 1, 211-360, vol. 2, 363-380, esp. vol. 1, 355-360, vol. 2, 363-372; Abū al-Fidā' al-Ḥāfiẓ b. Kathīr al-Dimashqī, *al-Nihāya fī al-Fitan wa al-Malāḥim*, ed. Muḥammad 'Aḥmad 'Abd al-'Azīz (n.p.: Dār al-Ḥadīth, n.d.), vol. 1, 11-18, 36-37; Ibn Abī Shayba, *al-Muṣannaf*, vol. 8, 590-649; Abū 'Abd Allāh Muḥammad b. Ismā'īl al-Bukhārī, *Ṣaḥīḥ al-Bukhārī* (Cairo: Dār 'Iḥyā' al-Turāth al-'Arabī, n.d.), vol. 4, 221 -233; Ibn Ḥajar al-'Asqalānī, *Fatḥ*, vol. 14, 524; Ibn Rushd I, *al-Bayān*, vol. 17, 240-3. For a work on *fitan* from a Shī'ī perspective, see Riḍā al-Dīn Abī al-Qāsim 'Alī b. Mūsā b. Ṭāwūs al-Ḥasanī al-Ḥusaynī, *al-Malāḥim wa al-Fitan* (Beirut: Mu'assasat al-'A'lamī, 1988).

[146] See cites above and Muḥammad 'Amḥazūn, *Taḥqīq Mawāqif al-Ṣaḥāba fī al-Fitna* (Riyad: Maktabat al-Kawthar, 1994), vol. 2, 169-183; Ibn Abī Shayba, *al-Muṣannaf*, vol. 8, 622-634; al-Zarakshī, *Sharḥ*, vol. 6, 220-1.

There is a tension in the *fitna* discourse between the fear of civil strife and the historical precedent of political activism. Precedents for both political pacificity and activism existed in Islamic history. The tension, however, was created because of the theological need to uphold the credibility of the companions who adopted diametrically-opposed positions on the use of force against fellow Muslims. The tension and the attempt to resolve it is well demonstrated in a passage by Ibn Rushd I. In commenting on the report that 'Ā'isha lamented the fact that people ignored the verse on *baghy*, he states:

> "By this statement 'Ā'isha meant to ascribe fault to the companions who refused to become involved in the wars that took place between them, and who abstained and refused to be with one side against the other. 'Ā'isha believed that it was their duty to attempt to reconcile between the contending parties, and if they were unable to effect a reconciliation, then they should have joined the forces of the party *they believed* to be in the right, as the verse requires them to do. [However], it should be noted that those who refused to join either side did so as to stay on the side of safety and certainty because they could not ascertain who was right and who was wrong. Hence it was incumbent upon them to abstain from becoming involved because it is not permitted for a Muslim to kill another while acting on speculative belief rather than certainty. Likewise, it was incumbent upon those who did fight to do so because *they believed* that to be right, pursuant to their own *ijtihād* on the matter. Consequently, each of them is praiseworthy for what they have done. The killer and the killed is in heaven, and this is what every Muslim should believe as to the conflict that befell the companions." [emphasis added][147]

Ibn Rushd I then goes on to argue that it would be improper to claim that every *mujtahid* is correct, and to believe that all the parties are equally right or equally wrong in order to avoid taking a position. Rather, one must assertively decide who is right or wrong. Sunnīs, Ibn Rushd I argues, believe that 'Alī was right and so he would be rewarded twice in the Hereafter, and the rebels were wrong, and so they would be rewarded once. Therefore, while 'Alī was ultimately the just party, his opponents are not blameworthy.[148]

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[147] Ibn Rushd I, *al-Bayān*, vol. 16, 360.

[148] Ibid., 361, vol. 18, 175-177. The issue of being rewarded twice or once refers to a *ḥadīth* attributed to the Prophet. According to this tradition, whoever performs *ijtihād* will be rewarded. It they are right they will be rewarded twice. If they are wrong they will be rewarded once. On this tradition, see Ismā'īl al-Jirāḥī, *Kashf al-Khifā' wa Muzīl al-'Ilbās* (Beirut: Mu'assasat al-Risāla, 1983), vol. 1, 66-8; Jalāl al-Dīn al-Suyūṭī, *'Ikhtilāf al-Madhāhib*, ed. 'Abd al-Qayyūm Muḥammad al-Basṭāwī (Cairo: Dār al-'I'tiṣām, 1404 AH), 21-39.

According to this argument, all the companions would end up in heaven. Nonetheless, the relevant question is: What happens to Muslims who follow their example, years or centuries later? Could rebels in later episodes of Islamic history be considered to be in error but not blameworthy because they followed the example of 'Ā'isha or Mu'āwiya? In other words, perhaps the *fitna* literature resolves the theological problem of upholding the credibility of all the companions, but it does not necessarily resolve the legal issue of how to discourse on or treat rebels after the age of the companions.

The nexus between the theological solution and the legal implications is exemplified in an exchange that reportedly took place between Abū Mūsā al-'Ash'arī (d. 42/662-3) and 'Abd Allāh b. Mas'ūd (d. 33/653).[149] An unidentified man asks al-'Ash'arī about the wars taking place between the companions. The man asks, "What if I take my sword and, seeking the pleasure of Allāh, strike with it whomever I wish?" Al-'Ash'arī responds, "You have a right to do so (*lakka dhālik*)." Ibn Mas'ūd who overheard the conversation cautions al-'Ash'arī, "Be careful with what you say, many will rebel in this *'umma*, all of them seeking the pleasure of Allāh, and none of them will find it."[150] Two trends are represented in this report: the theological (one has a right to act on his belief and support whichever companion one believes to be right), and the legal (an individualized subjective standard for the use of force could lead to lawlessness). There is a theological or moral imperative to act on ones beliefs, but there is the ever present risk that strife and lawlessness would become widespread. The report poses the tension between the two trends but does not resolve it.

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[149] There are contradictory reports on the dates of death for both individuals. According to one report, Abū Mūsā died 52/672. Ibn Mas'ūd is reported to have died 32/652-3. See H.A.R. Gibb and J.H. Kramers, ed., *Shorter Encyclopedia of Islam* (Leiden: E.J. Brill, 1991), 47, 150.

[150] See the discussion in Ibn Rushd I, *al-Bayān*, vol. 18, 288. Ibn Mas'ūd died during the caliphate of 'Uthmān, before the civil war between the companions. Abū Mūsā al-'Ash'arī was one of the judges in the arbitration (*taḥkīm*) between 'Alī and Mu'āwiya. He was 'Alī's representative, and he was either tricked by 'Amrw b. al-'Āṣ, or he deserted 'Alī and failed to fairly represent his claims. Because of these facts, this report is most certainly apocryphal. On al-'Ash'arī, see Abū 'Abd Allāh Muḥammad Ibn Sa'd, *al-Ṭabaqāt al-Kubrā* (Beirut: Dār Ṣādir, 1985), vol. 4, 105-116. On Ibn Mas'ūd, see Ibid., vol. 3, 150-158.

On the one hand, the *fitan* literature emphasized an imperative of abstaining from civil discord and fractitious conduct. But as Abū Ja'far al-Ṭabarī (d. 310/923) is reported to have argued, "If in every discord between two factions, one has the duty to escape and stay close to home (*luzūm al-manāzil*), no divine law would be upheld, and no injustice would be negated."[151] On the other hand, if one advocates an unmitigated duty to uphold what one believes to be right and just, the risk becomes widespread lawlessness or chaos. Both trends are well-represented in the theological tradition. In the Sunnī tradition, most of the debates take place in the context of discourses attempting to defend or rehabilitate the credibility of the Prophet's companions. These debates, with their various trends and tensions, became the foundation on which the law of rebellion was established. The juristic discourses on rebellion moved from the realm of theological apologetics to the realm of legalities in which the primary concern is the function of law and the construction of order. Before commencing on a description of the juristic debates on rebellion, we must first introduce the second Qur'ānic passage which is central to this field.

The *Ḥirāba* Verse

The second Qur'ānic verse relevant to this field is the following:

> "The punishment of those who wage war (*yuḥāribūn*) against God and His Prophet, and strive to cause corruption on the earth (*yas'ūna fī al-arḍi fasādan*) is that they be killed or crucified[152] or have a hand and foot cut off from opposite ends or be exiled in the land. That is their disgrace in this world and they will

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[151] Al-Qurṭubī, *al-Jāmi'*, vol. 16, 317.

[152] In Arabic, crucifixion (*ṣalb*) does not mean placing on the cross or the driving nails through the hands or feet. As the term is used in the Qur'ān and in Islamic law, it simply means tying and hanging someone on the bark of a tree (*yurbaṭ fī jiz' al-nakhla*). Tying someone to a cross would be considered heretical.

> receive a heavy punishment in the Hereafter. Except for those who repent before you are able to capture them. In that case, know that God is most-forgiving and merciful."[153]

This is often referred to as *'āyat al-ḥirāba* or the *ḥirāba* verse. Unlike the *baghy* verse, the attendant consequences to the act described are very severe. The possible punishments are execution, crucifixion, severance of limbs, or exile. Nonetheless, on the face of it, it is not clear what would bring these punishments into effect. Theoretically, the language "cause corruption on the earth" could be applied to a wide range of activities including anything from writing heretical poetry to raping and pillaging. Significantly, the language of the verse lends itself to use in the political field, and could easily be applied to rebellion or sedition.[154] If, as Crone and Hinds argue, the 'Umayyad and other caliphs saw themselves as the representatives of God and the Prophet (*khulafā' 'Allāh*), then arguably, one who fought against them would be fighting against God as well, and would deserve the severe punishments dictated in the verse.[155]

Conceptually, however, this verse might apply to those in power as well. In other words, the verse does not necessarily have to be read so that it applies only to those who rebel against an established government. Rather, it could also be read to mean that those in power could possibly be the corrupters of the earth. As will be seen, Muslim jurists insisted that this verse does not apply to rebels, and co-opted this verse to their discourse on highway robbers and brigands. By doing so, they argued that the harsh penalties dictated in the verse should not be applied to rebels, but should be applied to highway robbers and brigands. As we will see later, some jurists argued that even if the sulṭān and his supporters usurp property and terrorize people, then they should be treated as brigands.[156] The co-optation of the verse in this fashion, as will be demonstrated, took centuries.

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[153] Qur'ān 5:33-34.

[154] Interestingly, the famous translator of the Qur'ān, Yūsuf 'Alī, assumes that the verse applies to sedition and treason; Alī, *The Meaning*, 257. The Qur'ān, itself, seems to limit the notion of corruption on earth to "destroying crops and cattle." 2:205. In other words, the Qur'ān seems to assume that corruption on earth requires the act of destroying property or life.

[155] Crone and Hinds, *God's Caliph*, 24-42, 80-96.

The Qur'ān repeatedly condemns those who cause corruption on the earth,[157] and in one verse, it associates *fitna* with corruption on the earth.[158] But the verse quoted above is the only verse in which earthly punishments are dictated for an offense that relates to corruption on earth. The cited occasions for the revelation of this verse are as contradictory and ambiguous as the verse on *baghy*. Furthermore, it seems that in the early centuries of Islam, Muslim scholars could not agree on who was the intended subject of the verse.

The first set of reports are very general. In these reports, a group of scriptuaries (*ahl al-kitāb*) purportedly had an unspecified covenant with the Prophet, but they broke the covenant and caused corruption on the earth, so the verse was revealed. The second set of reports provide that the tribe of Hilāl b. 'Ūwaymir[159] entered into a reciprocal treaty with the Prophet not to attack any group that passed by Hilāl heading towards the Prophet. However, when a group from Banū Kināna passed by seeking to join the Prophet, Hilāl's tribe attacked, killing the men and stealing the property. The verse was then revealed. Importantly, some reports add that the Prophet was given a choice in dealing with them; he could select any of the penalties spelled out in the verse, including banishing them.[160] In a third set of reports, it is argued that the verse was revealed to address a group of polytheists who attacked Muslims, caused corruption on the earth, and then fled to non-Muslim territory before they could be captured.[161] A fourth set of reports asserts, without further elaboration, that the verse was revealed to address the Israelites (Banū Isrā'īl).[162] A fifth report asserts that the verse was revealed to address the Ḥarūriyya (the early Khawārij).[163]

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[156] For example, see Abū Muḥammad 'Alī b. 'Aḥmad b. Sa'īd b. Ḥazm, *al-Muḥallā bi al-'Āthār*, ed. 'Abd al-Ghaffār Sulaymān al-Bandārī (Beirut: Dār al-Kutub al-'Ilmiyya: n.d.), vol. 12, 283. Also see, al-Wazīr, *al-'Awāṣim*, vol. 8, 15, where he describes Yazīd I b. Mu'āwiya (r. 60-64/680-3) as the equivalent of a *qāṭi' ṭarīq*, (brigand).

[157] For example, see Qur'ān 2:11, 7:56, 7:85, 47:22, 2:205, 2:27, 13:25, 26:152, 5:32, 28:77, 30:41, 40:26, 5:64, 18:94, 2:60, 5:64, 11:85, 26:183, 28:77, 38:28. The expression "corruption on earth" is also found in the *fitan* literature, see note 141.

[158] Qur'ān 8:73.

[159] Also known as Abū Burda, see Abū al-Faraj 'Abd al-Raḥmān b. al-Jawzī al-Baghdādī, *Zād al-Masīr fī 'Ilm al-Tafsīr* (Beirut: al-Maktab al-Islāmī, 1965), vol. 2, 344. Also reported as Abū Barza al-'Aslamī, see Abū 'Abd Allāh Muḥammad b. 'Umar Fakhr al-Dīn al-Rāzī, *al-Tafsīr al-Kabīr wa Mafātīḥ al-Ghayb*, (Beirut: Dār al-Kutub al-'Ilmiyya, 1990), vol. 11, 169; 'Ibn Manẓūr, *Lisān*, vol. 2, 816.

[160] Al-Suyūṭī, *al-Durr*, vol. 2, 307; al-Jaṣṣāṣ, *'Aḥkām*, vol. 2, 407; Ibn al-Jawzī, *Zād*, vol. 2, 343; al-Ṭabarī, *Jāmi'*, vol. 5, 132.

The final report, and the one that espoused the most controversy, asserts that a group of men from the tribe of 'Urayna[164] adopted Islam and came to Medina in poor health. They complained to the Prophet that they were a people of the desert and, therefore, were unable to live in Medina. The Prophet sent with them camels so that they could drink the camels' milk and urine and regain their health. The Prophet also sent with them a Nūban shepherd boy known as Yasār.[165] The men stayed in a place called Liqāḥa (about six miles from Medina) until they recovered their health. The men then apostatized and tortured the shepherd boy by severing his limbs, inserting thorns in his eyes, and then crucifying him. They stole the camels and fled. After seizing them, the Prophet severed their hands and feet from opposite ends, blinded and crucified them, and then left them to die in the desert.[166] According to some reports, after killing them, the Prophet also burned their corpses.[167]

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[161] Al-Suyūṭī, *al-Durr*, vol. 2, 307; Ibn Kathīr, *Tafsīr*, vol. 2, 55, 59; Ibn al-Jawzī, *Zād*, vol. 2, 344; al-Ṭabarī, *Jāmi'*, vol. 5, 133; al-Rāwandī, *Fiqh*, vol. 1, 366; al-Ṭabrisī, *Majma'*, vol. 2, 82. Ibn al-'Arabī, *'Aḥkām*, vol. 2, 594-595, argues that this is the most convincing occasion for revelation.

[162] Al-Rāzī, *al-Tafsīr*, vol. 11, 169; al-Ṭabarī, *Jāmi'*, vol. 5, 134-5, argues that the most convincing opinion is that it was revealed concerning the Israelites. However, he argues that that does not necessarily mean that the verse should not apply to Muslims. Ibn al-'Arabī, *'Aḥkām*, vol. 2, 595 denies that it was revealed concerning the Israelites.

[163] Al-Suyūṭī, *al-Durr*, vol. 2, 305; Ibn Kathīr, *Tafsīr*, vol. 2, 55.

[164] According to one report, 'Urayna was from Bahrain, Ibn Kathīr, vol. 2, 55-56. Some sources report that they were from 'Ukl, see Abū 'Abd Allāh al-Raḥmān 'Aḥmad b. Shu'ayb b. 'Alī al-Nasā'ī, *Tafsīr al-Nasā'ī*, ed. Ṣabrī b. 'Abd al-Khāliq al-Shāfi'ī and Sayyid b. 'Abbās al-Julaymī (Beirut: Mu'assasat al-Kutub al-Thaqāfiyya, 1990), vol. 1, 434-435. Some reports assert that they were both from 'Ukl and 'Urayna or Bujayla and 'Urayna while other reports assert that they were from Banū Fazāra or Banū Salīm, see al-Suyūṭī, *al-Durr*, vol. 2, 305; Ibn Kathīr, *Tafsīr*, vol. 2, 56-7; al-Tha'ālibī, *al-Jawāhir*, vol. 1, 459. Shī'ī sources report that the men were from Banū Ḍaba, see Abū Ja'far Muḥammad b. Ya'qūb b. Isḥāq al-Kulaynī al-Rāzī, *al-Furū' min al-Kāfī*, ed. 'Alī Akbar al-Ghaffārī (Tehran: Dār al-Kutub al-Islāmiyya 1397 AH), vol. 7, 245; al-Ṭūsī, *Tahdhīb*, vol. 10, 135; al-'Āmilī, *Wasā'il*, vol. 18, 535.

[165] Al-Ṣāwī, *Ḥāshiya*, vol. 1, 280.

The debates around this particular report focused on whether the revelation of the verse meant to abrogate or reprimand the Prophet for what he did to the men from 'Urayna. It was argued that because mutilation (*muthla*) was prohibited in Islam, God reprimanded (*'ātaba*) the Prophet for blinding the men from 'Urayna, and for leaving them to die in the desert. Some reports assert that the prohibition against *muthla* came after, and not before this incident. Therefore, God did not reprimand the Prophet but abrogated what the Prophet had done, and specified the proper legal penalties when an offender betrays and causes corruption in the earth. Some sources argued that neither abrogation nor reprimand was applicable because the Prophet blinded the men as retaliation for blinding the shepherd boy, and hence, no mutilation was involved. Still other reports argue that the Prophet only intended to blind them, but before he was able to do so God revealed the verse, and, therefore, the Prophet refrained from any form of retaliation not specified in the verse.[168]

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[166] Al-Rāzī, *al-Tafsir*, vol. 11, 169; Ibn Kathīr, *Tafsīr*, vol. 2, 55-57; Ibn al-Jawzī, *Zād*, vol. 2, 343; al-Zamakhsharī, *al-Kashshāf*, vol. 1, 335; al-Ṭabrisī, *Majma'*, vol. 2, 82-4; Ibn Ḥajar al-'Asqalānī, *Fatḥ*, vol. 14, 66-69. This is the only occasion for revelation reported in the early works of Ibn Muqātil (150/767), *Tafsīr*, 74/I, 98, and al-Suddī (128/745), *Tafsīr*, 227. The incident is reported to have taken place in 6/627. On the incident, see Abū al-Faraj 'Abd al-Raḥmān b. Muḥammad b. al-Jawzī, *al-Muntaẓam fī Ta'rīkh al-'Umam wa al-Mulūk*, ed. Muḥammad 'Abd al-Qādir 'Aṭā and Muṣṭafā 'Abd al-Qādir 'Aṭā (Beirut: Dār al-Kutub al-'Ilmiyya, 1992), vol. 3, 263-264. Ibn Sa'd, *al-Ṭabaqāt*, vol. 2, 93, reports that Yasār was not sent with them. Rather, after 'Urayna stole the camels Yasār chased after them. They captured him, however, severed his limbs and stuck thorns in his tongue and eyes until he died. Ibn al-'Athīr, *al-Kāmil*, vol. 2, 94, mentions the incident passingly; he does not give any of the details. Abū 'Abd Allāh Sufyān b. Sa'īd b. Masrūq al-Thawrī, *Tafsīr Sufyān al-Thawrī* (Beirut: Dār al-Kutub al-'Ilmiyya, 1983), who died 161/777 does not mention any of the occasions of revelation. Several commentators maintain that the Prophet never crucified or blinded anyone. (See notes below.)

[167] Ibn Kathīr, *Tafsīr*, vol. 2, 57; al-Ṭabarī, *Jāmi'*, vol. 5, 133; al-Rāwandī, *Fiqh*, vol. 1, 366.

[168] Al-Suyūṭī, *al-Durr*, vol. 2, 305-6; Ibn Kathīr, *Tafsīr*, vol. 2, 56-57; al-Jaṣṣāṣ, *'Aḥkām*, vol. 2, 407-408; al-Ṣāwī, *Ḥāshiya*, vol. 1, 280; al-'Ālūsī, *Rūḥ*, vol. 6, 121-122; al-Ṭabarī, *Jāmi'*, vol. 5, 134-135; al-Kiyā al-Harrāsī, *'Aḥkām*, vol. 3, 65; Ibn al-'Arabī, *'Aḥkām*, vol. 2, 594; al-Qurṭubī, *al-Jāmi'*, vol. 6, 149-150; al-Tha'ālibī, *al-Jawāhir*, vol. 1, 459; al-Rāwandī, *Fiqh*, vol. 1, 366. Al-Zayla'ī, *Tabyīn*, vol. 3, 237, and Ibn al-Humām, *Sharḥ*, vol. 5, 408-9, asserts that the Prophet never crucified anyone. Ibn Ḥazm, *al-Muḥallā*, vol. 12, 285-288, argues vehemently that the 'Urayna tradition is authentic, but what the Prophet did to them does not even have the semblance of *muthla*. Shī'ī sources usually do not mention the blinding of the eyes. Al-Ṭabāṭabā'ī, *al-Mīzān*, vol. 5, 330-331, mentions the various positions, but is keen to point out that none of the reports that were narrated by *ahl al-bayt* contain the blinding of the eyes incident. The author's point is that the blinding of the eyes report is a fabrication. See the following Shī'ī sources: al-'Āmilī, *Wasā'il*, vol. 18, 535; al-Kulaynī, *al-Kāfī*, vol. 7, 245, does

Interestingly, some reports resolve the matter in the form of a *ḥadīth*. According to this report, when the incident with 'Urayna took place, the Prophet asked the angel Jibrīl about the proper course of action. Jibrīl then revealed the verse to the Prophet, and specified that those who steal should be amputated from opposite ends, those who murder should be killed, and those who kill and rape should be crucified. The Prophet punished the offenders accordingly, and did not blind any of them.[169]

Early Muslim commentators also disagreed on who was the intended subject of the verse on *ḥirāba*. Three main positions were advocated. The verse, it was argued, either applied to polytheists or apostates who waged war on Muslims, or to Muslims who committed highway robbery (*qaṭ' al-ṭarīq*). The latter position was eventually adopted by the vast majority of Muslim jurists. Many of the opinions were related to the specific occasion of revelation argued by the particular commentator. However, the emerging, and eventually dominant, legal opinion was that even if the verse was revealed in regards to polytheists or apostates, it was intended to apply to Muslims who commit an act of brigandage or highway robbery. In other words, even if the revelation of the verse was occasioned by the behavior of a certain group of polytheists or apostates, as a legal matter, the sanctions specified in the verse are to be applied to Muslims and not to polytheists or apostates.[170] In doing so, Muslim jurists argued that the punishments of execution,

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not mention the blinding of the eyes; al-Kāshānī, *Tafsīr*, vol. 2, 31, does not mention the blinding or the crucifying.

[169] Ibn Kathīr, *Tafsīr*, vol. 2, 58; al-Māwardī, *al-Nukat*, vol. 2, 33; al-Ṭabāṭabā'ī, *al-Mīzān*, vol. 5, 333. Al-Kāsānī, *Badā'i'*, vol. 7, 94, and Ibn al-Humām, *Sharḥ*, vol. 5, 407, mention that the Jibrīl *ḥadīth* occurred over the Abū Burda incident. A version of this *ḥadīth* is reported without the angel Jibrīl's involvement. This version mentions that after the Prophet captured the men from 'Urayna, he considered the matter, and then decided to amputate whoever stole property; execute whoever committed murder; and crucify whoever stole and committed murder, al-Suddī, *Tafsīr*, 227. There is also a *ḥadīth* reported from 'Ā'isha in which she says the Prophet said: "The blood of a Muslim cannot be shed except for three reasons: adultery, murder and a man who has apostated and fought Muslims (*kharaj min al-Islām fa ḥārab*). He must be killed, crucified or banished in the earth." See al-Suyūṭī, *al-Durr*, vol. 2, 306; al-Jaṣṣāṣ, *'Aḥkām*, vol. 2, 409.

[170] Al-Rāzī, *al-Tafsīr*, vol. 11, 169-70; al-Kiyā al-Harrāsī, *'Aḥkām*, vol. 3, 64; al-'Ālūsī, *Rūḥ*, vol. 6, 121; al-Ṭabrisī, *Majma'*, vol. 2, 82; al-'Ayīnī, *'Umda*, vol. 23, 284-6; al-'Ābī, *Sharḥ*, vol. 6, 93, 98; Ibn Ḥajar al-'Asqalānī, *Fatḥ*, vol. 14, 66, notes that the practice of Muslims proved that the verse was applicable to Muslim brigands. Al-Jaṣṣāṣ, *'Aḥkām*, vol. 2, 407-8, argues that the opinion of late jurists was that the verse applied to apostates but he rebuts this view and argues that the verse applies to Muslims.

amputation from opposite ends, crucifixion or banishment, as the verse specifies, are reserved for brigands or highway robbers. Concurrently, as we will demonstrate, a separate legal category was created for rebels who, according to the constructed discourse, were not to receive the same treatment, and were to be distinguished from the subjects of the *ḥirāba* verse.

This should be understood within the context of a rather complex historical practice. Banditry or brigandage played a social role in early Islamic history.[171] Islamic legal and historical sources are replete with references to violence caused by banditry. Furthermore, it is important to note that some of the groups that rebelled for ostensibly political or religious reasons such as the Khawārij, especially the 'Azāriqa, and the Qarāmiṭa used methods that are difficult to differentiate from common acts of banditry. These groups

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The author died in 370/980-1, and it is difficult to understand what he means by late jurists. The evidence is that the view that the verse applied to apostates emerged quite early. In all probability, however, al-Jaṣṣāṣ is referring to Ḥanafī jurists who emerged after the formative generation of the Ḥanafī school (circa 250 and on). See also the discussion in Abū al-Walīd Muḥammad b. 'Aḥmad Ibn Rushd al-Qurṭubī, *al-Muqaddimāt al-Mumahhidāt*, ed. Muḥammad Ḥajjī (Beirut: Dār al-Gharb al-Islāmī, 1988), vol. 3, 227-230; Abū al-Walīd Muḥammad b. 'Aḥmad b. Muḥammad b. 'Aḥmad b. Rushd al-Qurṭubī, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*, ed. 'Alī Muḥammad Mu'awwaḍ, and 'Ādil 'Aḥmad 'Abd al-Mawjūd (Beirut: Dār al-Kutub al-'Ilmiyya, 1996), vol. 2, 454-5. Al-Simnānī, *Rawḍa*, vol. 2, 1327, mentions that some argued that the verse itself was abrogated because the verse was conditioned on "those who fight the Prophet." (*wa ḥukmuhā al-yawm zā'il...wa 'annhā mansūkha wa sharṭuhā ghayr mawjūd.*) After the death of the Prophet that condition cannot exist. (It is not entirely clear whether al-Simnānī is asserting that the verse, itself, has been abrogated or whether he is arguing that the normative ruling established by the verse is now abrogated.)

[171] "Serfs" or "serf-like" individuals who could not pay their taxes or debts often became bandits, see B. Lewis, *Islam in History*, 308. It is likely that banditry continued to play an important social role throughout Islamic history. See Karen Barkey, *Bandits and Bureaucrats: The Ottoman Route to State Centralization* (Ithaca: Cornell University Press, 1994), esp. 152-156, 240, on the political and social role of banditry in the Ottoman administration. Barkey argues that the Ottoman administration did not distinguish between bandits and rebels, and that the state often negotiated with and co-opted bandits. This is by no means unique to Islamic history. On the role of banditry in the Roman Empire, see Ramsey MacMullen, *Enemies of the Roman Order: Treason, Unrest and Alienation in the Roman Empire* (London: Routledge, 1992), esp. 211-218. Also see Peter Laven, "Banditry and Lawlessness on the Venetian *Terraferma* in the Later *Cinquecento*," in *Crime, Society and the Law in Renaissance Italy*, ed. Trevor Dean and K.J.P. Lowe (Cambridge: Cambridge University Press, 1994), 221-48.

often slaughtered indiscriminately, raped, and usurped property.[172] As discussed later, Muslim jurists attempted to create legal categories that distinguished between rebels who spread terror and destruction, and rebels who used less destructive means.

The 'Urayna incident and the language of the *ḥiraba* verse seem to have been more consistent with the actual historical practice in the 'Umayyad and early 'Abbāsid period than the carefully structured discourses of the jurists would lead us to believe. I am not claiming that there is a causal connection between the *ḥiraba* verse and the historical practice. Rather, the language and the penalties of the *ḥiraba* verse were co-opted and imitated in historical practice. This, of course, could mean that the 'Urayna incident was an early 'Umayyad invention intended to sanction the way the 'Umayyads dealt with their political foes. In fact, as discussed below, the infamous 'Umayyad governor al-Ḥajjāj reportedly would cite the *ḥirāba* verse in defending his often ruthless policies against rebels.

The accusation of causing corruption on the earth was used frequently between political opponents in Islamic history. Early on, the execution by Mu'āwiya of the companion Ḥujr b. 'Adī al-Kindī and his supporters in 51/671, and the slaughter of al-Ḥusayn b. 'Alī and many members of the family of the Prophet in 61/680 during the reign of Yazid I, left a lasting impression on the collective memory of the jurists. Mu'āwiya is said to have ordered that one of al-Ḥujr's supporters be buried alive. The heads of al-Ḥusayn and his supporters were severed and paraded.[173] In the same year, there were summary executions of several Khawārij, and in one case the same year, a Khārijī was tortured with the sanctions identified in the *ḥirāba* verse: his feet and hands were amputated and then he was crucified.[174] Eventually, it became common practice during the 'Umayyads and early 'Abbāsids to execute and mutilate the bodies of rebels. Frequently, limbs from opposite ends would be severed, the corpse would be crucified, and at times, burned. It was also common practice to sever the head and send it to the ruler as a trophy. In some cases, opponents were taken captive and sold into slavery.[175] The

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[172] Montgomery Watt, *The Formative Period of Islamic Thought* (Edinburgh: Edinburgh University Press, 1973), 20-22. Idem, *Islamic Political Thought*, 55-56. See a description of the indiscriminate slaughter committed by the 'Azāriqa in al-Ṭabarī, *Ta'rīkh*, vol. 6, 373. On the 'Azāriqa, see al-Shahrastānī, *al-Milal*, vol. 1, 137-141. On the Qarāmiṭa, see Hugh Kennedy, *The Prophet and the Age of the Caliphates* (London: Longman, 1986), 186, 193-4; Thierry Bianqus, "Autonomous Egypt from Ibn Ṭūlūn to Kāfūr, 868-969," in *The Cambridge History of Egypt: Volume One, Islamic Egypt 640-1517*, ed. Carl F. Petry (Cambridge: Cambridge University Press, 1998), 87, 106-8. The Qarāmiṭa attacked hajj convoys, and in 317/930 they sacked Mecca and removed the revered black stone. See the description of this event in Ṭabarī, *Ta'rīkh*, vol. 11, 464, and Abū al-Fidā' al-Ḥāfiẓ b. Kathīr al-Dimashqī, *al-Bidāya wa al-Nihāya*, ed. 'Aḥmad Abū Mulḥim et al. (Beirut: Dār al-Kitāb, 1985), vol. 11, 171-174. Also see al-'Ābī, *Sharḥ*, vol. 6, 556.

[173] For the execution of Ḥujr and his supporters, see al-Ṭabarī, *Tarīkh*, vol. 5, 142-1, and Ibn al-'Athīr, *al-Kāmil*, vol. 3, 336. For the slaughter of al-Ḥusayn, see al-Ṭabarī, *Tarīkh*, vol. 5, 202-237; Ibn al-

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'Athīr, *al-Kāmil*, vol. 3, 428-444, and Abū Muḥammad 'Aḥmad b. 'A'tham al-Kūfī, *al-Futūḥ* (Beirut: Dār al-Kutub al-'Ilmiyya, 1986), vol. 3, 114-152.

[174] See Ibn al-'Athīr, *al-Kāmil*, vol. 3, 444-445.

[175] The following is a demonstrative, and not exhaustive, list: al-Ṭabarī, *Ta'rīkh*, vol. 5, 159 ('Ubayd Allāh Ibn Ziyād, Mu'āwiya's governor, severs the limbs of a Khārijī in 58/677 and kills his daughter); Ibn al-'Athīr, *al-Kāmil*, vol. 4, 343-4 (heads severed and Muslims enslaved during the reign of Yazīd b. 'Abd al-Malik, 102/720); Ibid., 455 (Zayd b. 'Alī killed, crucified and burned in 122/739 during the reign of Hishām b. 'Abd al-Malik). See the description of the Zayd b. 'Alī incident in Ibn al-Jawzī, *al-Muntaẓam*, vol. 7, 211-212 who says it took place in 121 AH; also see al-Ṭabarī, *Ta'rīkh*, vol. 7, 96 who says his corpse was crucified in 123 AH. Ibn al-Jawzī, *al-Muntaẓam*, vol. 7, 248 (the torture and killing of Khālid al-Qasrī, client of the 'Umayyads, in 126/743); ibid, vol. 7, 266 (the parading of the severed head of a Khārijī in 128/745); al-Ṭabarī, *Ta'rīkh*, vol. 7, 171-2, 187 (the killing and crucifixion of al-Ḥārith b. Surayj and al-Karamānī, who was crucified with a fish, in 128/745). Crucifying people with animals as an act of humiliation was a common practice in pre-modern times, see below. Al-Ṭabarī, *Ta'rīkh*, vol. 7, 164-5 (the massacre of rebels and execution of prisoners, bombardment with mangonels and the severing of the genitals and nose of a rebel in 127/744); al-Ṭabarī, *Ta'rīkh*, vol. 7, 175 (Marwān b. Muḥammad severs the hand, foot and tongue of an agent suspected of sympathizing with the Khawārij in 128/745).

See the various incidents described in Abū al-Ḥasan 'Alī b. al-Ḥusayn b. 'Alī al-Mas'ūdī, *Murūj al-Dhahab wa Ma'ādin al-Jawhar*, ed. Muḥammad Muḥyī al-Dīn 'Abd al-Ḥamīd (Cairo: Kitāb al-Taḥrīr, 1966), vol. 2, 102 (severing the head of al-'Ash'ath and carrying it to al-Ḥajjāj), 167 (crucifixion of Yaḥyā b. Zayd; al-Ṭabarī, *Ta'rīkh*, vol. 7, 116, also reports that his hand and foot were severed), 194 (execution and crucifixion of 'Umayyads by Abū al-'Abbās al-Ṣaffāḥ), 241 (killing of 'Abd 'Allāh b. 'Alī, and a slave girl by al-Manṣūr; placing them in a room and then demolishing it so that it looks like an accident), 258-9 (killing of al-Ḥusayn b. 'Alī b. al-Ḥasan and execution of many of his supporters) 346 (execution and crucifixion of Abū al-Sarāyā), 352-3 (execution and crucifixion of Ibn 'Ā'isha, grandson of Ibrāhīm al-Imām), 372 (crucifixion and burning of al-'Afshīn), etc.

Ibn Abī Shayba, *al-Muṣannaf*, vol. 8, 625-6, reports that Ibn al-Zubayr was crucified with a cat in a mosque and that Ibn 'Umar uttered words sympathetic to Ibn al-Zubayr. Al-'Ash'arī, *Maqālāt*, vol. 1, 150-166, has a long list of 'Alid rebels during the 'Umayyads and 'Abbāsids; he notes that most of them were killed, and some crucified after death. Abū 'Uthmān 'Amr b. Baḥr al-Jāḥiẓ, "*Risāla fī al-Nābita*," in *Rasā'il al-Jāḥiẓ: al-Rasā'il al-Kalāmiyya*, ed. 'Alī Abū Mulḥim (Beirut: Dār al-Hilāl, 1987), 244 -245, accuses the 'Umayyads of corruption on the earth and of crucifying their opponents. See Ibn al-Wazīr, *al-'Awāṣim*, vol. 8, 158, for a discussion of the crucifixion of Zayd b. 'Alī in 122/740. Also see various incidents discussed below.

point, of course, is not to make an essentialist assessment of early Muslim practices.[176] Nonetheless, it is important to note that these violent practices did, in fact, exist and hence, formed part of the cumulative heritage that was available to Muslim jurists as they constructed their legal discourses. Muslim jurists were well-aware of these practices, and often selectively referred to them in the context of creating separate legal categories between rebels and bandits.[177] Importantly, what Muslim jurists omitted or dismissed from the historical record is as significant as what they included. For example, it is reported that when Ibn Muljim assassinated ʻAlī, ʻAlī's dying testament was that Ibn Muljim should not be tortured or mutilated. Nonetheless, some historical reports claim that Ibn Muljim's hands and feet were amputated, his eyes were blinded and then he was killed and burned.[178] Similarly, according to some reports, al-Burak, the man who made a failed attempt on Mu'āwiya's life, had his hand and foot amputated from opposite ends and eventually, was killed and crucified.[179] Muslim jurists, however, as discussed later, do not cite or rely on these reports. They only mention that 'Alī ordered that Ibn Muljim not be tortured or mutilated, and then discuss whether Ibn Muljim should be treated as a rebel. In other words, the Ibn Muljim incident becomes channeled into a technical discourse on the necessary legal criteria for someone to qualify as a *baghi*. What Muslim jurists presented in their legal discourses, as often happens in legal discourses, is a highly-sanitized and cleansed version of historical practice in order to advocate a particular view of law and order.

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[176] There are many examples of amnesty or tolerance. For instance, in 117/735 a group of rebels agreed to surrender on the condition of being given amnesty. They were granted the request; al-Ṭabarī, *Tarīkh*, vol. 7, 54. In 82/701 ʻAbd al-Malik offered the people of Iraq the removal of al-Ḥajjāj if they would not support Ibn al-'Ash'ath's rebellion. Idem, vol. 6, 486, also see p. 489 for a release of prisoners. However, Ibn al-'Athīr, *al-Kāmil*, vol. 4, 203 says that al-Ḥajjāj killed 11,000 people when he tricked them with an offer of amnesty. Once they surrendered, he killed them. It seems that the ʻAbbāsids adopted a benevolent policy towards rebels from the same ruling family (i.e. the ʻAbbāsids), at least until the caliphate of al-Ma'mūn (d. 218/833); See Jacob Lassner, *Islamic Revolution and Historical Memory* (New Haven: American Oriental Society, 1986), 113.

[177] Abū al-Qāsim Muḥammad b. 'Aḥmad b. Juzayy al-Kalbī al-Gharnāṭī, *Qawānīn al-'Aḥkām al-Shar'iyya wa Masā'il al-Furū' al-Fiqhiyya*, ed. ʻAbd al-Raḥmān Ḥasan Maḥmūd (Cairo: ʻĀlam al-Fikr, 1985), 456, notes that al-Ḥajjāj killed and crucified ʻAbd Allāh b. al-Zubayr. He also notes ʻAbd al-Malik b. Marawān, the 'Umayyad caliph, killed all who opposed him. Jamīl b. Khamīs al-Sa'dī, *Qāmūs al-Sharī'a al-Ḥāwī li Ṭuruqihā al-Wasī'a* (Oman: Wizārat al-Turāth, 1983), vol. 8, 355, claims that all rebels before the reign of the 'Umayyad caliph ʻUmar b. ʻAbd al-ʻAzīz were amputated from opposite ends and blinded. Al-'Ābī, *Sharḥ*, vol. 6, 535, discusses al-Ash'ath's rebellion and his death. Abū ʻAbd Allāh Muḥammad b. Farḥūn, *Tabṣirat al-Ḥukkām fī Uṣūl al-Qaḍāyā wa Manāhij al-'Aḥkām* (Beirut: Dār al-Kutub al-ʻIlmiyya, n.d.), vol. 2, 192, mentions the crucifixion of a man accused of being a heretic (*zindīq*). One of the points that the Khārijī Abū Ḥamza al-Mukhtār b. ʻAwf mentions against the 'Umayyad caliph Marwān b. Muḥammad is that he blinded his opponents and cut off their hands and feet, see Crone and Hinds, *God's Caliph*, 132.

[178] Al-Mas'ūdī, *Murūj*, vol. 1, 609; Ibn al-'Athīr, *al-Kāmil*, vol. 3, 258, reports that the people (*al-ʻāmma*) burned him but does not mention the amputation or blinding; Ibn al-Jawzī, *al-Muntaẓam*, vol. 5, 175, reports that it was ʻAlī who told his family to kill and burn Ibn Muljim. Jamāl al-Dīn Abū al-Faraj ʻAbd al-Raḥmān b. ʻAlī Ibn al-Jawzī, *Talbīs 'Iblīs* (Jeddah: Dār al-Madanī, 1983), 130, says Ibn Muljim's hands and feet were amputated and his eyes were burned with a hot rod. Ibn al-Wardī, *Ta'rīkh*, vol. 1, 155, does not report ʻAlī's testament concerning Ibn Muljim. He does report that ʻAbd Allāh b. Ja'far amputated Ibn Muljim's hand and foot, cut his tongue off, blinded him and then had the corpse burned. Ibn A'tham, *al-Futūḥ*, vol. 2, 281, 284, asserts that while ʻAlī was on his death bed, ʻAlī told his sons to execute Ibn Muljim only if he (ʻAlī) dies. However, ʻAlī was keen about protecting Ibn Muljim from molestation, and

Early reports indicate that the distinction between a bandit and a rebel was not as clear and precise as it eventually became in the constructed discourse of the jurists. In these early reports, the language and symbolism of the *ḥiraba* verse are used in a sufficiently ambiguous context which could be applicable to rebels. One report, for example, asserts that the sulṭān is the avenger of blood for whoever fights religion and causes corruption on the earth.[180] What this means is that the relatives of the victim of the crime, who are normally the avengers of blood, do not decide the fate of the offender; the ruler becomes the avenger of blood, and he decides the offender's fate. Notably, the report does not mention highway robbery; it only talks of those who fight religion and cause corruption, an obvious reference to the *ḥirāba* verse. However, Muslim jurists, as will be discussed,

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would often ask if Ibn Muljim had been fed. When 'Alī died, al-Ḥassan executed Ibn Muljim without mutilating him, but Alī's supporters tore Ibn Muljim's corpse to pieces.

[179] Ibn al-'Athīr, *al-Kāmil*, vol. 3, 259. Al-Mas'ūdī, *Murūj*, vol. 1, 611 reports that he was either killed or was released after he promised to kill 'Alī.

[180] 'Abd al-Razzāq, *al-Muṣannaf*, vol. 10, 111-112; Ibn Abī Shayba, *al-Muṣannaf*, vol. 7, 605. Different versions of this report are attributed to 'Umar b. al-Khaṭṭāb, the second caliph, or to 'Umar b. 'Abd al-'Azīz, the 'Umayyad caliph. 'Umar b. 'Abd al-'Azīz ordered his governor in Kūfa not to fight rebels unless they shed blood and cause corruption on the earth. He also offered to debate them before fighting, Ibn al-'Athīr, *al-Kāmil*, vol. 4, 317. Debating before fighting was reportedly the habit of 'Alī as well. This became a part of the rules of conduct with the *bughā*.

interpreted this report so that it only applied to highway robbers and bandits but not to rebels.

It is quite clear that there was quite a bit of overlap between the *ḥirāba* and *baghy* verses in the first centuries of Islam. For example, some of the early reports argued that 'Alī fought those who caused corruption on the earth or that the opponents of 'Alī were *muḥāribūn* in the sense in which the verse used these expressions.[181] The language, symbolism and boundaries of the two categories were often diluted and mixed, not just in historical practice, but in legal discourse as well. This was particularly so when Muslim jurists discussed the Khawārij and their terror-oriented methods. As noted above, a set of reports claimed that the *ḥirāba* verse was revealed to address the early Khawārij (*al-Ḥarūriyya*).[182] In fact, some late Muslim jurists, in certain contexts, lapsed the categories of *baghy* and *ḥirāba* together.[183] But, as will be shown, for the most part, the two categories became separate and distinct, and even the Khawārij were declared to be rebels, entitled to the treatment given to the *bughā*, and not bandits.

The laws of *ḥirāba*, in their basic form as constructed by the jurists, maintained that if a highway robber kills, he must be killed; if he usurps property and kills, he is to be killed and crucified;[184] if he usurps property alone, he is to be amputated from opposite ends; and if he terrorizes but does not kill and does not usurp property, he is to be exiled or banished. If the highway robber repents before being captured, he is to be pardoned.[185] Importantly, this basic structure is called *tartīb*; a basic proportionality is argued between the crime and punishment. This contrasts with a methodology of *takhyīr* in which discretion is given to the ruler to apply whichever punishment the ruler sees fit. So, for example, even if a highway robber does nothing more than terrorize caravans, but does not kill or usurp property, he may still be killed, amputated or crucified. In a *takhyīr* scenario, the ruler possesses a considerable amount of power and discretion; no proportionality between the offense and the punishment needs to exist. For easy reference, we will call this the *tartīb* versus *takhyīr* debate.

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[181] 'Alī is reported to have told the Khawārij that he would not fight them until they started causing corruption on the earth, Ibn Ḥajar al-'Asqalānī, *Fath*, vol. 14, 288. Some sources state that 'Alī fought those who caused corruption on the earth, see al-Kāsānī, *Badā'i'*, vol. 7, 140. Other reports state that those who fight the clients of God (*awliyā' 'Allāh*) have committed *ḥirāba* against God. See al-Nasafī, *Madārik*, vol. 1, 394-395; al-Rāzī, *Tafsīr*, 117.

[182] Early reports often refer to the early Khawārij as highway bandits, see 'Abd al-Razzāq, *al-Muṣannaf*, vol. 10, 117.

[183] Some late Sunnī jurists state that those who fought 'Alī are *muḥāribūn* pursuant to the verse, but go on to argue that the penalties specified by the verse apply only to highway robbers, see al-Jaṣṣāṣ, *'Aḥkām*, vol. 2, 406. Also see Ibn Ḥazm, *al-Muḥalla*, vol. 12, 281-283, who gives a very broad definition of *ḥirāba*.

[184] As noted earlier, crucifiction meant the hanging or tying of a person or corpse to the bark of a tree. It did not mean nailing or placing someone of a cross.

As argued above, it is rather clear that the 'Umayyads, in the first century of Islam applied, or at least used, the dogmatic symbolism of the *ḥirāba* verse against their political opponents. The use of crucifixion against political opponents, who were often indistinguishable from brigands or bandits, is by no means unique to the Islamic tradition. The Romans did not distinguish between bandits or rebels, and often punished either or both by crucifixion and impaling.[186] Nevertheless, in trying to find an Islamic grounding for their policies, the 'Umayyads must have found the *ḥirāba* verse to be quite convenient.

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[185] There are many varieties of this basic structure which will be discussed later.

[186] See Kraemer, "*Apostates*," 68-69; B.S. Jackson, *Theft in Early Jewish Law* (Oxford: Clarendon Press, 1972), 33-35. Interestingly, Maimonides in the *Mishneh Torah* dedicates a chapter to rebels. In this chapter the death sentence is mandated for rebellious elders who defy or resist the rulings of the Supreme Court. See Moses Maimonides, *The Code of Maimonides: The Book of Judges*, trans. Abraham M. Hershman (New Haven: Yale University Press, 1977), 138-150. Also see MacMullen, *Enemies*, 218; Pandias M. Schisas, *Offenses Against the State in Roman Law* (London: University of London Press, 1926), 3-15. On political crimes and blinding, amputations, burying alive, burning, hanging with dogs, torture and quartering, see Wolfgang Schild, "History of Criminal Law and Procedure," in *Criminal Justice Through the Ages*, trans. John Fosberry (Rothenburg, Germany: Mittelalterliches Kriminalmuseum, 1981), 129-130, 134, 140-148. But see, Richard A. Bauman, *Crime and Punishment in Ancient Rome* (London: Routledge, 1996), 24, 81 for clemency and humanitarian positions. Anglo-Saxon law punished murder, treason, arson, manifest theft and assaults upon homes with execution, see John Hudson, *The Formation of the English Common Law* (New York: Longman, 1996), 78. The *Leges Henrici* assigned several pleas as belonging to the king alone. Among such pleas were breach of the king's peace, unfaithfulness or treason, despising or speaking badly of the king, arson, assault on the king's highway, rape and abduction. L.J. Downer, trans., *Leges Henrici Primi* (Oxford: Clarendon Press, 1972), 108. Under Glanvill the killing or betrayal of the king, the breach of the king's peace, homicide, arson, robbery, rape, and forgery were all treated as a special category of crimes punishable by death or cutting off of limbs. See Hudson, *The Formation of the English*, 161.

Furthermore, there is some evidence that suggests that the 'Umayyads and the early 'Abbāsids advocated the doctrine of *takhyīr*, according to which no proportionality needs to exist between an alleged offense and the penalty.[187] It appears that it was the Kūfans and al-Shāfi'ī (d. 204/819-20) who adopted and argued for the *tartīb* option.[188] This is consistent with the position, which we argue later, that the Kūfans and al-Shāfi'ī played key roles in developing the law of rebellion in Islam.

In order to establish the law of banditry, and distinguish it from the law of rebellion, Muslim jurists sought to ground their discourse in the authority of reports. These reports gave the distinct impression that not only the Rightly Guided Caliphs 'Umar and 'Alī, but also the 'Umayyads recognized the law of banditry as a distinct legal field. These reports can be seen as counter-traditions to 'Umayyad practice. In one report, the 'Umayyad caliph 'Abd al-Malik b. Marwān (r. 65/685 - 86/705)[189] wrote to 'Anas b. Mālik (d. 91-93/709-711), a companion of the Prophet, asking him about the *ḥirāba* verse. 'Anas wrote back informing him that when the 'Urayna incident took place, the Prophet asked Jibrīl about God's judgment in the matter. Jibrīl informed the Prophet that whoever terrorized people and usurped property should have his hand and foot amputated from opposite ends; whoever terrorized people and committed murder should be killed; and whoever terrorized people and committed rape should be crucified. Another version states that the Prophet asked Jibrīl about the punishment of those who committed the crime of *ḥirāba*, and Jibrīl gave the same response as above.[190] Note that the *tartīb* position is now articulated as God's will, communicated through Jibrīl.[191] Another narrative creates a negative nexus between the *ḥirāba* verse, and the 'Umayyad administration. Al-Ḥajjāj, (d. 86/705) the 'Umayyad governor of Kūfa, is reported to have asked 'Anas b. Mālik about the *ḥirāba* verse, and 'Anas told him about what the Prophet did to 'Urayna. Al-Ḥajjāj would thereafter proclaim in his sermons, "'Anas b. Mālik has told me that the Prophet amputated the limbs of people and blinded them and you claim that I apply cruel punishments to you?" 'Anas b. Mālik remarks that he wished that he ('Anas) would have died before telling al-Ḥajjāj of the 'Urayna incident.[192] Interestingly, 'Anas lived a fairly active political life, and supported several rebellions. He was even, at one point, punished and humiliated by al-Ḥajjāj for his political activity.[193] It is doubtful that 'Anas b. Mālik would have been indiscreet enough to tell al-Ḥajjāj about the 'Urayna incident. The likelihood is that the 'Urayna incident is an 'Umayyad invention, and this report attributed to 'Anas was a counter-tradition alerting its audience to the dangers inherent in this precedent.

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[187] According to some reports, early Shī'ī jurists upheld the doctrine of *takhyīr* out of *taqiyya* (dissimulation adopted for personal safety or the safety of others), see al-'Āmilī, *Wasā'il*, vol. 18, 536; Abū Ja'far Muḥammad b. al-Ḥasan b. 'Alī al-Ṭūsī, *al-'Istibṣār fīmā Ikhtalafa min al-Akhbār*, ed. Ḥasan al-Mūsawī al-Kharsān (Tehran: Dār al-Kutub al-Islamīyya, 1390 AH), vol. 4, 257. Ibn al-Murtaḍā, *Kitāb al-Baḥr*, vol. 6, 199-200, notes that some early jurists adopted the position of absolute *takhyīr* according to which the ruler can choose any punishment regardless of the nature of the crime. He, however, says that absolute *takhyīr* is unjust. Most of the reports in al-'Āmilī, *Wasā'il*, vol. 18, 532-537, adopt *tartīb*. On some of the *tartīb* reports, however, see al-Majlisī, *Malādh*, vol. 16, 260, 268.

[188] 'Ibn Ḥajar al-'Asqalānī, *Fatḥ*, vol. 14, 67. It is reported that during the reign of the 'Abbāsid caliph al-Mu'taṣim (r. 218/833 - 227/842) a group of bandits were seized after attacking a caravan going to Ḥajj. Al-Mu'taṣim gathered a group of jurists, among them was the ninth 'Alid 'imām Abū Ja'far Muḥammad b. 'Alī al-Riḍā (d. 220/835), and asked what the punishment should be. After citing the verse on *ḥirāba*, all the jurists advised that the caliph had absolute discretion (*takhyīr*). Abū Ja'far, however, said that the jurists were wrong and advised that the rule of God is *tartīb*. If the bandits terrorized people without anything further, they were to be banished by being placed in jail. If they terrorized and killed, they were to be killed. If they terrorized, killed and usurped property, they were to be amputated from opposite ends and crucified. According to the report, al-Mu'taṣim implemented Abū Ja'far's advice on the matter. Al-'Āmilī, *Wasā'il*, vol. 18, 535-536.

[189] It should be recalled that during 'Abd al-Malik's reign Ibn al-Zubayr was crucified, and the infamous governor of Iraq, al-Ḥajjāj, was appointed.

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[190] Al-Suyūṭī, *al-Durr*, vol. 2, 305; Ibn Kathīr, *Tafsīr*, vol. 2, 56, 58; al-Māwardī, *al-Nukat*, vol. 2, 33; al-Ṭabarī, *Jāmi'*, vol. 5, 134.

[191] This report was not accepted by everyone. For example, Mālik b. 'Anas (d. 179/795), the jurist, is reported to have adopted either an unlimited *takhyīr* position, see Ibn Ḥajar al-'Asqalānī, *Fatḥ*, vol. 14, 67, or a somewhat limited *takhyīr* position, see 'Abd al-Salām b. Sa'īd al-Tanūkhī Saḥnūn, *al-Mudawwana al-Kubrā* (Beirut: Dār al-Fikr, 1986), vol. 4, 428. Abū 'Abd Allāh Mālik b. Anas, *al-Muwaṭṭa'*, narrated by 'Abū Muṣ'ab al-Zuhrī, ed. Bashshār 'Awād Ma'rūf and Maḥmūd Muḥammad Khalīl (Beirut: Mu'assasat al-Risāla, 1993), does not have this report or many of the other reports on *ḥiraba*.

[192] Abū al-Qāsim Maḥmūd b. 'Umar al-Zamakhsharī, *Rabī' al-'Abrār fī Nuṣūṣ al-Akhbār*, ed. 'Abd al-Amīr Muhanā (Beirut: Mu'assasat al-A'lamī, 1992), vol. 3, 315. In another version, al-Ḥajjāj asks 'Anas to tell him about the harshest penalty the Prophet ever exacted. 'Anas told him about the 'Urayna incident. Al-Ḥajjāj used to tell people, "the Prophet amputated the hands and feet of people, and left them to die in the desert," and he would cite this incident in justifying his own cruel policies. 'Anas would often say that he never regretted anything as much as he regretted telling al-Ḥajjāj about this incident, Ibn Kathīr, *Tafsīr*, vol. 2, 55-56; al-Zarakshī, *Sharḥ*, vol. 6, 361. However, it is also reported that 'Anas said that fighting bandits is better than fighting the Romans, Ibn Farḥūn, *Tabṣira*, vol. 2, 185.

[193] See Gibb and Kramers, *Shorter Encyclopedia of Islam*, 43. Also see below.

In an anti-crucifixion tradition, Mālik b. 'Anas (d. 179/795), the jurist, is asked about crucifixion as a punishment. He responds that he has not heard of anyone who has applied this penalty except for 'Abd al-Malik b. Marwān, who crucified a man named al-Ḥārith.[194] The impression given in this report is that crucifixion is an almost unheard-of penalty.[195] By implication, crucifiction is identified as unusual, and, perhaps, contrary to the inherited practice. In another report about yet another 'Umayyad caliph, 'Umar b. 'Abd al-'Azīz (r. 99/117 - 101/720), the harsh aspects of the *ḥirāba* verse are de-emphasized. 'Umar's governor wrote to him stating that he had captured a group of robbers. The governor quoted the *ḥirāba* verse but omitted the part in the verse that referred to banishment (*nafy*), therefore implying that the robbers should be killed, crucified or amputated but not banished or exiled. 'Umar wrote back to his governor chiding him for the omission, and saying, "Do not alter things [according to your whim]. Have you dedicated yourself to killing and crucifying people? ... If you get my letter, banish the robbers to Shaghab."[196] In a widely cited report it is asserted that 'Alī pardoned a bandit who repented and asked for a guarantee of safe conduct before being captured.[197] Similar reports claim the same for 'Uthmān, Mu'āwiya and even al-Ḥajjāj.[198] 'Alī is also reported to have banished bandits from Kūfa to Baṣra.[199]

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[194] Saḥnūn, *al-Mudawwana*, vol. 4, 428. Al-Ḥārith al-Mutanabbī al-Kadhdhāb claimed to be a Prophet and seems to have gathered a large following. He was crucified and killed in Jerusalem in 79/698, see Ibn al-Jawzī, *al-Muntaẓam*, vol. 6, 204-210; Ibn Kathīr, *al-Bidāya*, vol. 9, 29-31. As discussed above, several people had been crucified before this incident, including Ibn al-Zubayr who was crucified in 73/692. Of course, because al-Ḥārith was considered a heretic, this could be read as a pro-'Umayyad tradition. In other words, it could be interpreted as giving credit to the 'Umayyads for being the first to properly protect religion. I do not believe this interpretation is persuasive because the tradition simply mentions al-Ḥārith without any derogatory identification such as *al-kadhdhāb* (the liar).

There is a report that 'Alī crucified a man for banditry. Here crucifiction simply means the act of hanging on a tree. See al-Nu'mān, *Da'ā'im*, vol. 2, 475; Abū Ja'far Muḥammad b. 'Alī al-Qummī Ibn Bābawayh al-Ṣadūq, *Kitāb man lā Yaḥḍuruhu al-Faqīh*, ed. 'Alī 'Akbar al-Ghaffārī (Qum: Mu'assasat al-Nashr al-Islāmī, n.d.), vol. 4, 68; al-Kulaynī, *al-Kāfī*, vol. 7, 246; al-Ṭūsī, *Tahdhib*, vol. 10, 135.

[195] Perhaps Mālik was referring to the Christian concept of nailing to the cross. However the historical accounts are not clear as to how Ḥārith was crucified.

[196] Al-Ṭabarī, *Jāmi'*, vol. 5, 141, another report says that the robbers were Coptic Christians. Another version emphasizes that the robbers had only terrorized people but they did not steal nor kill anyone. Yet, the governor wanted to amputate or kill them. 'Umar chided the governor and told him to banish them instead, Abū al-Walīd Sulaymān b. Khalaf al-'Andalusī al-Bājī, *al-Muntaqā Sharḥ Muwaṭṭa' al-Imām Mālik* (Beirut: Dār al-Kitāb al-'Arabī, 1983), vol. 7, 169, 171.

The point is not that all of these reports are necessarily apocryphal or that there was no authentic Islamic practice in the first century of Islam. Authenticity and the formation of the authoritative, however, is a creative and constructive process of selection, co-optation and direction. Principles and precedents are selected, co-opted and channeled towards certain results. Legal reasoning is both creative and selective, at least until it becomes encumbered by the cumulative and progressive weight of precedent. As the corporate structure of law and jurists become more formed, and as precedent and legal rulings accumulate, the creative process becomes more constrained and burdened. Even then, the creative legal process does not necessarily slow or come to a full stop. Rather, the legal process finds a more disciplined and limited method to articulate creativity and development. This usually takes place through the art of distinguishing one precedent from another or arguing that a former rule or precedent is inapposite to a contemporary case.

As we demonstrated, two verses from the Qur'ān were candidates for selection and co-optation.[200] The reports surrounding these verses are complex and conflicting.

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[197] Al-Suyūṭī, *al-Durr*, vol. 2, 307; Ibn Kathīr, *Tafsīr*, vol. 2, 59; al-'Ālūsī, *Rūḥ*, vol. 6, 121; Ibn Abī Shayba, *al-Muṣannaf*, vol. 7, 603; al-Zamakhsharī, *al-Kashshāf*, vol. 1, 336; al-Ṭabāṭabā'ī, *al-Mīzān*, vol. 5, 332; 'Athīr al-Dīn Muḥammad b. Yūsuf Abū Ḥayyān al-'Andalusī, *Tafsīr al-Nahr al-Mādd min al-Baḥr al-Muḥīṭ* (Beirut: Dār al-Jinān, 1987), vol. 1, 577; al-Qurṭubī, *al-Jāmi'*, vol. 6, 155; al-Kāsānī, *Badā'i'*, vol. 7, 96; Abū Bakr Muḥammad b. 'Aḥmad Shams al-Dīn al-Sarakhsī, *al-Mabsūṭ* (Beirut: Dār al-Ma'rifa, 1986), vol. 9, 204; 'Abd Allāh b. 'Aḥmad, *Masā'il al-Imām 'Aḥmad b. Ḥanbal*, ed. Zuhayr al-Shāwīsh (Beirut: al-Maktab al-Islāmī, 1988), 430. The name of the bandit is al-Ḥārith b. Badr. Ibn Ḥazm claims that al-Ḥārith was 'Alī's enemy and used to malign him, Ibn Ḥazm, *al-Muḥallā*, vol. 12, 274. This raises the question of whether al-Ḥārith was a political opponent.

[198] Ibn Kathīr, *Tafsīr*, vol. 2, 59-60 (for 'Uthmān and Mu'āwiya); al-Ṭabarī, *Jāmi'*, vol. 5, 143-144 (for 'Alī, 'Uthmān, Mu'āwiya); also see p. 146 where it is claimed that al-Ḥajjāj knew the technicalities of the law of banditry and the rules of repentance from such an offense.

[199] Al-Ṭūsī, *Tahdhīb*, vol. 10, 133; al-'Āmilī, *Wasā'il*, vol. 18, 533. There is no indication as to whether this was before or after the Battle of Baṣra.

[200] I am not arguing that these were the only possible verses that could have been selected and co-opted. For example, there are reports that al-Bāqir, Ibn 'Abās, 'Ammār and 'Ali said that some of the Qur'ānic verses on fighting the hypocrites (9:73) and apostasy (5:54) were revealed to address the *bughā* of the Battle of Baṣra, see al-Suyūrī, *Kanz*, vol. 1, 387-388.

Furthermore, they reflect a tension between various trends in early Islam. It is logical to assume that the 'Umayyads and early 'Abbāsids would have wanted to co-opt the *ḥirāba* verse and use it against their political foes, and some of the evidence does point in this direction. As argued earlier, the function of law and the role of jurists tend to emphasize the need for order and stability. Furthermore, the terror-based and indiscriminate methods of some rebellious groups, such as the Khawārij, emphasized the need for security and stability. Yet there are also certain contravening considerations. The Qur'ān does command Muslims to enjoin the good and forbid the evil,[201] which could imply a duty to resist injustice. Furthermore, some of the most notable figures in Islamic history rebelled against those in power.[202] The 'Umayyads and 'Abbāsids came to power through a rebellion as well. Significantly, Muslim jurists, for a variety of reasons discussed later, had an interest in mitigating the cruelty by which rebels were treated. These diverse elements and considerations motivated Muslim jurists, when it came to dealing with fellow Muslims, to create two categories of discourse, one concerned with rebels and the other concerned with bandits. We will now address some of the historical circumstances that led to the development of these categories of discourse.

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[201] For example, Qur'ān 3:104, 9:112. These verses and the reports surrounding them require a separate study.

[202] For example, al-Ṣan'ānī, *al-Rawḍ*, vol. 4, 8, lists among the notables, the rebellions of al-Ḥusayn (d. 61/680), Ibn al-'Ash'ath (d. 82/701), Zayd b. 'Alī (d. 122/740) and Muḥammad b. 'Abd Allāh (al-Nafs al-Zakiyya) (d. 145/762). See Modarressi, *Crisis and Consolidation*, 6, on Sunnī support.

CHAPTER 2

THE HISTORICAL CONTEXT

The Early Context and Ibn Taymiyya's Claims

Ibn Taymiyya (d. 728/1327-8) accuses the *fuqahā'* of Kūfa[203] and al-Shāfi'ī (d. 204/819-20) of inventing *'aḥkām al-bughā*. They did so, he claims, because they wished to defend 'Alī; and so they argued that it was incumbent upon 'Alī to fight those who rebelled against him; and that it was incumbent upon Muslims to support 'Alī against the rebels. But they carried this beyond the legacy of 'Alī, and transformed their position into a legal principle (*qā'ida fiqhiyya*). According to this legal principle, they declared whomever they wished to be the just ruler (*al-'ādil*), and those who opposed him to be the rebels (*al-bughā*). Then, they argued that it was necessary to support the just ruler by fighting against those who rebelled against him. The truth of the matter, Ibn Taymiyya argues, is that nothing had been reported from the Prophet about fighting the rebels except for one fabricated *ḥadīth*.[204] All the books of *ḥadīth* do not refer to fighting the rebels, rather they only refer to fighting the Khawārij and the apostates. These jurists, 'Ibn Taymiyya contends, confused *fitna* wars with the *bughā* wars, and equated fighting the Khawārij and the hypocrites, which is proper, with fighting unjust rulers, which is improper. Effectively, these jurists opened the door for all types of people to rebel while believing that they were seeking the establishment of justice. The reality, however, is that these rebels spread corruption and caused more damage than good.[205] Even if people believed that they were enjoining the good and forbidding the evil when they rebelled, they were only doing more harm than good.[206]

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[203] By Kūfa, Ibn Taymiyya probably means the pre-Ḥanafite jurists of the city such as Ibrāhīm al-Nakha'ī, Shārik etc. The jurists of Kūfa eventually developed into the Ḥanafī school of law. See, on the Kūfa school and its development, Melchert, *The Formation of the Sunni Schools of Law*, 32-38.

[204] This is the *ḥadīth* discussed above in the context of the revelation of the *baghy* verse.

We will return to Ibn Taymiyya's arguments later, but for now it is important to note that he sees wars between Muslims within a dichotomous paradigm: theological wars versus political wars. Theological wars are fought against *'ahl al-'ahwā'* or *bida'* (people of heretical beliefs), such as the Khawārij. Political wars are fought against opponents over political-power. Political wars are a *fitna* and prohibited by God. Theological wars are *bughā* wars, and are legal and even recommended.[207] Ibn Taymiyya's basic point is that Muslims should refrain from getting involved in political wars.

Ibn Taymiyya is correct in suspecting that Kūfa and al-Shāfi'ī were responsible for the development of a legal discourse -- a discourse which Ibn Taymiyya considers to be unfortunate. But, as he seems to realize, his argument for a dichotomy between the war of

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[205] Ibn Taymiyya, *Majmū' al-Fatāwā*, ed. Muḥammad b. 'Abd al-Raḥmān b. Qāsim (Riyad: n.p., n.d.): vol. 4, 440-441, 444, 450-452, the author also says that followers of 'Aḥmad b. Ḥanbal (d. 241/ 855) and Abū Ḥanīfa (d. 150/767) contributed to this invention. Also see Ibn Taymiyya, *Minhāj*, vol. 2, 233, 244. Al-Nawawī, *al-Majmū'*, vol. 1, 9, says that al-Shāf'ī was the first to write on *qitāl ahl al-baghy* (fighting the rebels).

[206] Ibn Taymiyya, *Minhāj*, 243.

[207] Ibn Taymiyya includes 'Alī's wars against Mu'āwiya and 'Ā'isha, and the wars between the 'Abbāsids al-'Amīn (d. 198/813) and al-Ma'mūn (d. 218/833) as part of the *fitna* wars. He also argues that the rebellions of al-Ḥusayn b. 'Alī, Ibn al-Zubayr, Zayd b. 'Alī, Muḥammad b. 'Alī al-Imām (the initiator of the 'Abbāsid *da'wa*), and the rebellion of Abū Muslim (d. 137/754), the 'Abbāsid client, against the last 'Umayyad caliph Marwān b. Muḥammad (al-ḥimār), were all a *fitna*. See Ibn Taymiyya, *Minhāj*, vol. 2, 233, 241-3, 245-6; Idem, *Majmū'*, vol. 4, 450-2. Ibn Taymiyya also maintains that the fighting referred to in the *baghy* verse is a third type of fighting that is unrelated to the other two types of war, Idem, *Minhāj*, vol. 2, 233. Elsewhere, Ibn Taymiyya talks about the sinfulness of those who fight out of tribalism, and blind solidarity (*'aṣabiyya wa da'wā jāhiliyya*) such as the Syrian tribes of Qays and Yaman. He implies that this is different from those who fight over power or kingship as is the case in the wars of *fitna*. See Ibn Taymiyya, *al-Siyāsa al-Shar'iyya,* 70, 83. Qays and Yaman fought a very bloody battle in Marj Rāhiṭ in 65/684. The Yamanis won, and provided the basis for the rule of the 'Umayyad caliph Marwān b. al-Ḥakam who died in 65/685. The feud between the two tribes, however, continued for centuries. See, on these two tribes, Patricia Crone, "Were the Qays and Yemen of the 'Umayyad Period Political Parties?" *Der Islam* 71, no. 1 (1994): 1-57.

The war between al-'Amīn and al-Ma'mūn lasted roughly from 193/809 until al-Ma'mūn entered Baghdād in 204/819. Interestingly, Kennedy, *The Prophet,* 152, in commenting on this war, remarks: "The fighting, once begun, was increasingly difficult to stop and *bāb al-fitna*, the gate of civil strife, once opened, proved very difficult to close."

fitna, as he defines it, and the war of *baghy* is as much of an invention as is the discourse of his opponents. He argues that *'aḥkām al-bughā* was invented when, among other things, al-Khiraqī (d. 334/945-6), the Ḥanbalī jurist, relied on or borrowed from al-Muzanī (d. 264/877-8), the Shāfi'i jurist, and al-Muzanī relied on Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/805), the Ḥanafī jurist.[208] It is entirely reasonable to suspect that the discourse developed through a process of juristic borrowing. In fact, law often develops through a process of borrowing or transplanting, but this does not make the legal discourse artificial or any less authentic.[209]

What Ibn Taymiyya seems to concede is that this so-called invention spread and became widely accepted, and, in fact, had an impact on the way people understood and reacted to authority. But, as we will demonstrate later, his own position involved a reconstruction of Islamic history no less creative or inventive than the process adopted by the jurists he criticizes. Furthermore, the discourses of the jurists who developed *'aḥkām al-bughā* were as motivated by their historical context as Ibn Taymiyya was motivated by his own. In a significant passage, Ibn Taymiyya criticizes those who fail to distinguish between fighting the Khawārij and the *bughā*, and then he states:

> "This is why you will find that many from this group [i.e. those who do not recognize the distinction] become involved in the whimsies of the kings and governors. They command people to fight on the side [of the kings and governors] basing themselves on the argument that they [the kings and governors] are the just party (*ahl al-'adl*) and that those who fight them are the unjust party (*al-bughā*). In doing so, they are just like the fanatics who adhere [blindly] to certain jurists, theologians or [ṣūfī] masters, and whimsically claim that they are right and their opponents are wrong...This is widespread among the scholars of the *'umma*, and its laity, rulers and soldiers."[210]

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[208] Ibn Taymiyya, *Majmu'*, vol. 4, 450-1.

[209] Alan Watson, *Legal Transplants* (Charlottesville: University of Virginia Press, 1974), 21-30, 95-101. For the specific culture of law and the implications for the development of law, see Idem, *The Evolution of Law* (Baltimore: Johns Hopkins University Press, 1985), 115-119.

[210] Ibn Taymiyya, *Majmū'*, vol. 4, 452.

In this passage, Ibn Taymiyya criticizes *'aḥkām al-bughā* because it is used by some to solicit support for those in power. In other words, the argument that it was imperative to support 'Alī against those who rebelled against him is now used against the rebels of Ibn Taymiyya's age. But, as stated above, Ibn Taymiyya also blames *'aḥkām al-bughā* for encouraging insurrection and rebellion. Whether Ibn Taymiyya was aware of the paradoxical nature of his argument is open to conjecture. Nonetheless, this paradox points to the highly contextual nature of his arguments, and to the fact that his criticisms of the early jurists are an anachronism. Furthermore, Ibn Taymiyya ignores the fact that *'aḥkām al-bughā* is not just concerned with determining who can be designated as a *bāghī* but is much more concerned with how those designated are to be treated. As we noted earlier, many Muslim jurists insist that the term *baghy*, in its legal context, does not imply blame (*laysa 'ism dhamm*). Furthermore, as noted earlier, those who are designated as *bughā* cannot be executed, tortured, imprisoned or have their property confiscated. These various factors or elements make Ibn Taymiyya's narrative on the purpose and history of *'aḥkām al-bughā* problematic, and lead us to restate the question: Why was the discourse on rebellion initiated?

Ibn Taymiyya reports that the traditionist Yaḥyā b. Ma'īn (d. 233/848) complained to 'Aḥmad b. Ḥanbal (d. 241/855) about the fact that al-Shāfi'ī cites or relies on the conduct of 'Alī with the *bughā*. By doing so, Yaḥyā complained, he is making some companions of the Prophet, such as Ṭalḥa and al-Zubayr, *bughā*, which Yaḥyā contends is highly improper. Ibn Ḥanbal is reported to have answered: "Woe unto you! What else could he [al-Shāfi'ī] do in this context?"[211] The report uses the word *bughā* here in its non-technical and non-legal sense; it is using the word in its linguistic sense, which means the unjust. The report could have two possible distinct interpretations. It could mean that al-Shāfi'ī is referring to an already existing discourse by 'Alī on the *bughā*, and that by doing so al-Shāfi'ī is supporting 'Alī and maligning Ṭalḥa and al-Zubayr. Alternatively, it could mean that al-Shāfi'ī, by citing 'Alī's conduct, is taking part in a discourse that is novel and troubling. The first interpretation would blame al-Shāfi'ī for not exercising appropriate discretion in failing to censor an already existing discourse initiated by 'Alī. The second interpretation would blame al-Shāfi'ī for taking part in creating a discourse that to this point had not existed. Both interpretations are ahistorical and make little sense.[212] Nevertheless, the report points to an unresolved theological tension in the discourses on the *bughā*. As we discussed earlier, the *'aḥkām al-bughā* discourse has serious implications for the debate on the credibility and merit of some of the Prophet's companions. Furthermore, as we discuss later, much of the discourse on the *bughā* revolved around whether individuals after the time of the companions of the Prophet were *bughā* or not. In this sense, part of the discourse was about the legitimacy of the 'Umayyad or 'Abbāsid dynasties. Nonetheless, this does not explain why the citing of 'Alī's conduct, more than a hundred years after the fact, would pose a problem or tension worth circulating a report about.[213]

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[211] Ibid., vol. 4, 438. Ibn Taymiyya interprets Ibn Ḥanbal's response to mean, who else from among the Rightly Guided Companions could al-Shāfi'ī cite or rely upon. This report defends al-Shāfi'ī's discourse by making Ibn Ḥanbal agree with him. The report is probably apocryphal or, at least, the Ibn Ḥanbal response part of it, since it is very unlikely that Ibn Ḥanbal would have agreed with al-Shāfi'ī's narrative on *'aḥkām al-bughā*.

Part of the response can be gleaned from some of the Shī'ī discourses on 'Alī's conduct. Several Shī'ī sources, in attempting to explain 'Alī's benevolent conduct with his enemies, note that his conduct was better for his party than anything under the sun (*khayrun li shī'atihi min mā ṭala'at 'alayhi al-shams*).[214] 'Alī knew, it is argued, that he would have a party of followers (*li'annahu kāna ya'lamu 'annahu sayakūna lahu*

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[212] As noted above, al-Nawawī, *al-Majmū'*, vol. 1, 9, claims that al-Shāfi'ī wrote a chapter on *qitāl ahl al-baghy*. This does not mean that al-Shāfi'ī invented the discourse. It only means that he was the first to re-state an already existing discourse into a systematic legal field.

[213] I am not using the expression "circulating a report" here to mean inventing and then spreading a report. I am using the expression to mean selecting, remembering, preserving and spreading a report. The idea of invention or the lack of it, as stated earlier, is not interesting. The mere fact that a report was remembered and preserved, whether it was invented or not, is the material issue.

[214] Al-'Āmilī, *Wasā'il*, vol. 11, 56-7.

shīʿa), and that an unjust government would prevail.[215] He also knew that if he did not follow a benevolent policy towards his opponents, then his party would have suffered untold hardships from their opponents (*la laqiyat shīʿatuhu min al-nāsi balā'an ʿaẓīmā*).[216] If ʿAlī would have held his opponents captive or confiscated their properties, then people would have done the same to his followers. Effectively, it is argued that ʿAlī set a precedent that was followed, to an extent, by Muslims after him, and that the benefactors of this precedent were ʿAlī's followers. The reports also claim that anyone who examines history will see proof of the truth of this assertion, i.e. that ʿAlī's followers benefited from ʿAlī's precedent.[217] Muḥammad Ḥasan al-Najafī (d. 1266/1850) also notes that ʿAlī wanted to set the precedent so that all who came after him would be judged by that standard. Hence, if anyone did not follow ʿAlī's example, it would be known that he/she exceeded the limits and committed injustice.[218]

In all probability this discourse is not historical, but this is largely inapposite. Most of the statements of the jurists above seem to be focused on the contention that ʿAlī's conduct prevented Sunnī Muslims from enslaving Shīʿīs, and, in fact, it does seem that, for the most part, Sunnīs did not sell captive rebels into slavery.[219] More importantly, the Shīʿī reports point to the possibility that ʿAlī's conduct was used by Muslim jurists as a means of articulating criticism against the conduct of the 'Umayyads and early ʿAbbāsids.

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[215] Ibid., vol. 11, 58-9.

[216] Ibid., vol. 11, 59.

[217] Ibid., vol. 11, 56-59; al-Ṭusī, *Tahdhib*, vol. 6, 154, 155.

[218] Al-Najafī, *Jawāhir al-Kalām*, vol. 21, 330, 335. This author, and the authors above, also note that the *qā'im* (awaited messiah) does not need to follow ʿAlī's example when he appears from occultation.

[219] For incidents where this did not hold true, see Ibn al-'Athīr, *al-Kāmil*, vol. 4, 344, for the enslavement of rebels in the rebellion of Yazīd b. al-Muhallab in 102/720-1. Ibn Khayyāṭ, *Ta'rīkh*, vol. 2, 368, 370, reports the enslavement of Muslims in al-Maghrib in 122 and 124 AH. Also see *Akhbār Majmūʿa*, ed. 'Ibrāhīm al-'Abyārī (Beirut: Dār al-Kutub al-Islāmiyya, 1981), 47-48, for the enslavement of Muslims, who included Arabs, in Muslim Spain in 124/742. In his masterful study, Khalid Yahya Blankinship, *The End of the Jihād State: The Reign of Hishām Ibn ʿAbd al-Malik and the Collapse of the Umayyads* (Albany: State University of New York Press, 1994), 221, comments on this incident by asserting that the enslavement of Muslims was contrary to received and accepted practice, and that Islamic sources expressed outrage at the incident.

We have already argued that ‘Alī's conduct was constructed by the collective memory of Muslims and, particularly, by the jurists. Sunnī, especially the Shāfi‘ī, sources are more one-sided about the portrayal of ‘Alī's conduct than their Shī‘ī counterparts. In other words, they are more unequivocal about asserting ‘Alī's benevolent conduct than Shī‘ī sources. To argue that ‘Alī's conduct was constructed does not mean that I am arguing it was invented. Construction is a selective process of remembering and emphasizing, not inventing. The question then is: What was the point of this construction? It would stand to reason that early Muslim jurists developed the discourse as a critical leverage against those in power in the first centuries of Islam. This is especially so when we consider the role played by many jurists in the rebellions of early Islam.

As discussed later, late Sunnī sources often insist that al-Ḥusayn b. ‘Alī did not commit a sin by rebelling against Yazīd b. Mu‘āwiya.[220] This, however, is hardly surprising considering the infamy that Yazīd enjoys in Islamic history.[221] However, as we will see later, many late Sunnī sources express sympathy with ‘Alid contenders to 'Umayyad and ‘Abbāsid caliphs. For example, al-Dhahabī (d. 748/1374) asserts that al-Ḥasan (d. 49/669), al-Ḥusayn (d. 61/680), Zayn al-‘Ābidīn (d. 95/713) and his son al-Bāqir (d. 114/733) were all qualified to be caliphs. Al-Dhahabī goes on to state that al-Bāqir's son Ja‘far al-Ṣādiq (d. 148/765) was more worthy of the caliphate than al-Manṣūr (r. 137/754-159/775), and al-Ṣādiq's son Mūsā al-Kāẓim (d. 183/799) was more worthy of the caliphate than Hārūn al-Rashīd (r. 170/786 194/809).[222] This is demonstrative of the impact of the legacy of the family of the Prophet and their descendants (*ahl al-bayt*) on the collective conscience of subsequent Muslims. It is also demonstrative of the problematic basis of the legitimacy of the 'Umayyad and 'Abbāsid caliphates. Importantly, moreover, it reflects the impact of the precedents set by some of the early jurists in supporting, or at least sympathizing with, rebellions in early Islam.

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[220] For example, al-Dardīr printed with al-Ṣawī, *Bulghat al-Sālik*, vol. 2, 414; Shams al-Dīn al-Muḥammad Al-Dusūqī, *Ḥāshiyat al-Dusūqī ‘alā al-Sharḥ al-Kabīr* (Beirut: Dār 'Iḥyā' al-Kitāb al-‘Arabī, n.d.), vol. 2, 298. Also see al-Wazīr al-Yamānī, *al-‘Awāṣim*, vol. 8, 63. Al-Dhahabī, *Siyar*, vol. 4, 38, refers to him as the martyr, and says that God withdrew his blessings from Yazīd because he killed al-Ḥusayn.

[221] As discussed later, Ibn Taymiyya attempts to rehabilitate Yazīd's reputation in Islamic history by reinterpreting many of the offenses attributed to Yazīd.

[222] Al-Dhahabī goes on to praise other members of the ‘Alids, and criticize the Shī‘ī doctrine of occultation; al-Dhahabī, *Siyar*, vol. 13, 120-22. I am grateful to Modarressi, *Crisis and Consolidation*, 6, for this cite. Al-Dhahabī also asserts that Zayd b. ‘Alī died a martyr. Al-Dhahabī, *Siyar*, vol. 5, 391.

The Early Rebellions and the Jurists

Al-Ḥusayn b. 'Alī, the Prophet's grandson, was killed in the Battle of Karbalā' in 61/680 after rebelling against the 'Umayyads. While one cannot claim that this was a major rebellion,[223] the moral impact of the incident far outweighed its political impact.[224] Many Sunnī jurists strongly sympathized with al-Ḥusayn and lamented his martyrdom. However, among the many early rebellions, 'Abd Allāh b. al-Zubayr's rebellion in Mecca was particularly serious, and posed a formidable challenge to the 'Umayyads.[225] Because Ibn al-Zubayr's rebellion seemed to be based on a Qurayshī claim to power, it occupies an ambiguous position in the discourses of Muslim jurists. As we will see later, Muslim jurists disagree on whether his rebellion was based on tribalism (*'aṣabiyya*) or a legitimate claim to power.[226] However, it is reported that 'Anas b. Mālik said that Ibn al-Zubayr had a more legitimate claim to power than Marwān or his son, 'Abd al-Mālik.[227] Apparently, 'Anas accepted Ibn al-Zubayr's caliphate and was appointed by Ibn al-Zubayr to lead prayer in Baṣra.[228] Furthermore, Abū Bakr al-Zuhrī (d. 123/740 or 124/741), whose father supported Ibn al-Zubayr, played a crucial role in the development of the reports on the treatment due to rebels.[229] Al-Zuharī reconciled himself to the 'Umayyads but he also transmitted material unfavorable to them.[230] Although al-Zuharī accepted the reality of power in his age, consistent with the logic of jurists, he remained sufficiently distant and focused on the technicalities of the treatment of rebels which were intentionally unhelpful to the 'Umayyads.

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[223] See M.A. Shaban, *Islamic History: A New Interpretation I* (Cambridge: Cambridge University Press, 1971), 91.

[224] For example, Sunnī historical sources dedicate a relatively large amount of space to this incident, and narrate its particulars in great detail. See Ibn al-'Athīr, *al-Kāmil*, vol. 3, 407-444; Ibn Kathīr, *al-Bidāya*, vol. 8, 152-214; Ibn al-Jawzī, *al-Muntaẓam*, vol. 5, 335-348; al-Ṭabarī, *Ta'rīkh*, vol. 5, 176-236; Ibn 'A'tham, *al-Futūḥ*, vol. 3, 71-155.

[225] On Ibn al-Zubayr's rebellion, see Marshall G.S. Hodgson, *The Classical Age of Islam*, vol. 1 of *The Venture of Islam: Conscience and History in a World Civilization* (Chicago: University of Chicago Press, 1974) 219-223; Kennedy, *The Prophet*, 89-98.

[226] For example, see Ibn Ḥajar al-'Asqalānī, *Fatḥ*, vol. 14, 309, 573-4, 577-8, and al-'Ābī, *Sharḥ*, vol. 6, 561-2, 564.

In 63/683, Medina rebelled against Yazīd b. Mu'āwiya which led to the infamous Battle of Ḥarra. After the siege of Medina, Muslim b. 'Uqbah, pursuant to Yazīd's orders, raped and pillaged the city for three days. Importantly, many religious scholars were killed when they took part in the rebellion.[231] The Syrian forces then headed to Mecca seeking to defeat Ibn al-Zubayr. During the siege, Yazīd died and the siege was lifted but not before Mecca was bombarded with mangonels and the Ka'ba was burned.[232] In 65/684, a movement known as al-Tawwābūn (the repentants) marched out of Kūfa seeking to avenge the killing of the Prophet's grandson, al-Ḥusayn. The Syrians, however, defeated them without much difficulty.[233] But in 66/685, Kūfa, which remained loyal to the 'Alid cause, rebelled under the leadership of al-Mukhtār b. Abī 'Ubayd who proclaimed Muḥammad b. al-Ḥanafiyya (d. 81/700) as the awaited Mahdī, and vowed to avenge the killing of al-Ḥusayn.[234] Al-Mukhtar's rebellion, however, lasted for two years and never extended beyond Kūfa.[235] He was betrayed by the *'ashrāf* (notables) of Kūfa, and was killed in 67/687 by the forces of his competitor Ibn al-Zubayr.[236] Importantly, many prominent scholars gave their oath of allegiance to Ibn al-Zubayr, and he effectively controlled Hijāz, 'Irāq, and Egypt.[237] After the 'Umayyad Marwānids were able to re-consolidate their power, 'Abd al-Malik recaptured Egypt and

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[227] See al-'Ābī, *Sharḥ*, vol. 6, 567, who also reports that when the Medinan jurist Sa'īd Ibn al-Musayyib (d. 91/709) refused to give his *bay'a* to Ibn al-Zubayr, he was flogged. He was flogged again when he refused to give his *bay'a* to al-Walīd b. Marwān. For a discussion of this issue, see Ibn al-Jawzī, *al-Muntaẓam*, vol. 6, 322. Reportedly, Ibn al-Zubayr threatened to burn 'Abd Allāh b. al-'Abbās and Muḥammad b. al-Ḥanafiyya if they did not give him their *bay'a*. Ibn al-Zubayr also imprisoned Ibn al-Ḥanafiyya, see Ibn Khallikān, *Wafayāt*, vol. 4, 172; al-Mas'ūdī, *Murūj*, vol. 2, 59; Ibn 'A'tham, *al-Futūḥ*, vol. 3, 273-81.

[228] Al-Ḥajjāj punished 'Anas for supporting Ibn al-Zubayr. See al-Dhahabī, *Siyar*, vol. 3, 402; Ibn al-Khayyāṭ, *Ta'rīkh*, vol. 1, 255.

[229] For example, see 'Abd al-Razzāq, *al-Muṣannaf*, vol. 10, 120-1.

[230] See Watt, *The Formative Period*, 70; see al-Dhahabī, *Siyar*, vol. 5, 329, where 'Abd al-Mālik b. Marwān taunts al-Zuhrī about his father's past. 'Abd al-Mālik tells al-Zuhrī, "Your father was a man of *fitan* (*kāna 'abūka la na''āran fī al-fitan*)." Al-Zuhrī then asked the caliph to forget and forgive the past.

[231] See Ibn Taymiyya, *Minhāj*, vol. 2, 241; al-'Ābī, *Sharḥ*, vol. 6, 529-30; al-Qasṭalānī, *Irshād*, vol. 10, 199; Ibn al-Wardī, *Ta'rīkh*, vol. 1, 165. For a description of the raping and pillaging, and the religious notables who were killed, see al-Mas'ūdī, *Murūj*, vol. 2, 54-55; Ibn Kathīr, *al-Bidāya*, vol. 8, 223-227; Ibn Jawzī, *al-Muntaẓam*, vol. 6, 14-16; Ibn al-'Athīr, *al-Kāmil*, vol. 3, 456-462; al-Ṭabarī, *Ta'rīkh*, vol. 5, 246-250; Ibn 'A'tham, *al-Futūḥ*, vol. 3, 181-191. Badr al-Dīn Abū 'Abd Allāh 'Umar b. 'Abd Allāh al-Shiblī al-Ḥanafī, *'Iḥkām al-Marjān fī 'Aḥkām al-Jānn* (Beirut: Dār al-Qalam, 1988), 230-1, claims so many companions of the Prophet were killed in Medina to the point that even the jinn cried.

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[232] For the bombardment of Mecca and the burning of the Ka'ba, see al-Mas'ūdī, *Murūj*, vol. 2, 55-56; Ibn al-Kathīr, *al-Bidāya*, vol. 8, 228; Ibn Jawzī, *al-Muntaẓam*, vol. 6, 22; Ibn al-'Athīr, *al-Kāmil*, vol. 3, 464; al-Ṭabarī, *Ta'rīkh*, vol. 5, 251-252; Ibn al-Wardī, *Ta'rīkh*, vol. 1, 165; Ibn 'A'tham, *al-Futūḥ*, vol. 3, 185. As noted by the sources above, some reports attempted to clear the Syrian forces from the responsibility of burning the Ka'ba.

[233] Ibn al-Jawzī, *al-Muntaẓam*, vol. 6, 35-37; Ibn al-'Athīr, *al-Kāmil*, vol. 4, 3-12; Shaban, *Islamic History*, 93-95.

[234] Ibn al-Jawzi, *al-Muntaẓam*, vol. 6, 28-9. Al-Mukhtār executed some individuals who were implicated in al-Ḥusayn's death, see al-Mas'ūdī, *Murūj*, vol. 2, 58; Ibn al-'Athīr, *al-Kāmil*, vol. 4, 27-49. Ibn 'A'tham, *Futūḥ*, vol. 3, 270, 291-2, report that al-Mukhtār tortured and mutilated many people accused of being involved in al-Ḥusayn's death. Reportedly, he severed their hands and feet, cut off their lips, tongues, ears or noses, blinded them, burned them or had them flogged to death. Also see Ibn al-Wardī, *Ta'rīkh*, vol. 1, 168.

[235] Some sources insist that al-Mukhtār was a fraud, and that he even conspired to have al-Ḥusayn surrendered to the 'Umayyads. See Ibn Kathīr, *al-Bidāya*, vol. 8, 252-3.

[236] Ibn al-Jawzi, *al-Muntaẓam*, vol. 6, 64-66; Ibn al-'Athīr, *al-Kāmil*, vol. 4, 64-72; al-Ṭabarī, *Ta'rīkh*, vol. 6, 359-70; Ibn 'A'tham, *al-Futūḥ*, vol. 3, 326-7. Reportedly, seven thousand of al-Mukhtār's supporters were executed, see Ibn al-Wardī, *Ta'rīkh*, vol. 1, 168. This number is probably exaggerated although it was not uncommon for the victorious party to eliminate the entire camp of the defeated. On al-Mukhtār and various assessments of the impact and meaning of his rebellion, see Kennedy, *The Prophet*, 95-96; Hodgson, *The Venture*, 222; Shaban, *Islamic History*, 94-96; Roberto Marin-Guzman, *Popular Dimensions of the 'Abbāsid Revolution: A Case Study of Medieval Islamic Social History* (Cambridge: Fulbright-Laspau, 1990), 63-65.

[237] Ibn Kathīr, *al-Bidāya*, vol. 8, 242-3. As noted above, one of them was 'Anas b. Mālik. Ibn Kathīr notes that before Ibn al-Zubayr was able to consolidate his power, there were many *fitan* and various types of *bughā* who fought each other, see p. 250.

Kūfa from Ibn al-Zubayr and directed al-Ḥajjāj b. Yūsuf to besiege Mecca. Once again, Mecca was bombarded with mangonels, and water and food were cut off from the city in 73/792.[238] Several notable individuals including Ibn al-Zubayr, himself, were killed in the siege.[239]

A considerable number of jurists were involved in a rebellion led by 'Abd al-Raḥmān b. al-'Ash'ath against the 'Umayyads.[240] Nonetheless, in many ways, Ibn al-'Ash'ath was not an ideal candidate to lead a rebellion. He had betrayed al-Mukhtār, and, for a period of time, became a partisan of the 'Umayyads. Nonetheless, he was supported in Baṣra and Kūfa, especially by the piety-minded al-Qurrā', an esteemed class of Qur'ānic students. In 81/701, Ibn al-'Ash'ath was defeated by al-Ḥajjāj in the Battle of Dīr al-Jamājim, and considerable slaughter ensued[241]. Many jurists were killed either in battle or shortly thereafter.[242] Al-Ḥajjāj punished some jurists, such as 'Anas b. Mālik;[243] pardoned some, such as al-Sha'bī;[244] and executed some, such as Sa'īd b. al-

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[238] See Ibn Kathīr, *al-Bidāya*, vol. 8, 334-335; al-Ṭabarī, *Ta'rīkh*, vol. 6, 406; Ibn al-Wardī, *Ta'rīkh*, vol. 1, 169; Ibn 'A'tham, *al-Futūḥ*, vol. 3, 386-7.

[239] Ibn Kathīr, *al-Bidāya*, vol. 8, 350-4, Ibn Kathīr holds Ibn al-Zubayr in high esteem. He repeats the invocation "May God be pleased with him" and calls him *amīral-mu'minīn*. It makes sense that Ibn Kathīr would praise Ibn al-Zubayr because Ibn al-Zubayr was hostile to 'Alī, and Ibn Kathīr was rather unsympathetic to 'Alī's cause. But also see Ibn al-Jawzī, *al-Muntaẓam*, vol. 6, 124-127, 137-141; Ibn al-'Athīr, *al-Kāmil*, vol. 4, 121-129, calls him a caliph and speaks of his virtues. Also notes that Ibn al-Zubayr was crucified with a dog or fish after he was killed at p. 127. Ibn al-Wardī, *Ta'rīkh*, vol. 1, 169, reports that Ibn al-Zubayr was pious. Ibn 'A'tham, *al-Futūḥ*, vol. 3, 389, reports that Ibn al-Zubayr was crucified after he was killed.

[240] Al-'Ābī, *Sharḥ*, vol. 6, 533-538; Ibn Taymiyya, *Minhāj*, 241. Among the jurists were Sa'īd b. Jubayr (d. 94/712-13), al-Sha'bī (d. 109/727-728), Ibn Abī Laylā (d. 148/765), Dharr b. al-Ḥamdānī (d. 82/701), and even the Prophet's companion 'Anas b. Mālik (d. 93/711).

[241] See, on the event generally, al-Ṭabarī, *Tarīkh*, vol. 6, 485-488, 491-504; Ibn 'A'tham, *al-Futūḥ*, vol. 4, 84-115. Kennedy, *The Prophet*, 101; Marin-Guzman, *Popular Dimensions*, 30.

[242] Ibn Kathīr, *al-Bidāya*, vol. 9, 55; Ibn al-'Athīr, *al-Kāmil*, vol. 4, 213-217.

[243] Al-Ābī, *Sharḥ*, vol. 6, 535.

[244] Ibn Kathīr, *al-Bidāya*, vol. 9. 52-53; Ibn al-Jawzī, *al-Muntaẓam*, vol. 6, 248-9; Ibn al-'Athīr, *al-Kāmil*, vol. 4, 221.

Jubayr.[245] According to one report, al-Ḥajjāj brought 'Anas before him, and said: "You foul person, you roam in *fitan*. Once you support 'Alī, then you support Ibn al-Zubayr, and then you support al-'Ash'ath. By God, I will strike you like a tree is struck down." Although 'Anas managed to escape, he was eventually apprehended and beaten.[246]

Some jurists such as Ṭalq b. Ḥabīb (d. 100/718) and Ḥasan al-Baṣrī (d. 110/728) are reported to have vehemently opposed getting involved in the rebellion. Al-Baṣrī is reported to have argued that, "al-Ḥajjāj is God's punishment; do not [attempt] to repel God's punishment with your own hands, but repel it with prayer and supplication." Similarly, Ṭalq b. Ḥabīb would say, "Fight the *fitna* with piety."[247] Al-Baṣrī, who became a prominent figure in the *bughā* discourse, also opposed a Baṣran rebellion under the leadership of Yazīd b. al-Muhallab against the 'Umayyads. Ibn al-Muhallab was killed in the rebellion, and a number of the rebels were executed in 102/720.[248] However, it seems that al-Baṣrī did not oppose Ibn al-Muhallab just out of a general aversion to rebellion. Rather, he considered him to be indistinguishable from the 'Umayyad despots. When asked if he excused or forgave the corruption of the 'Umayyads, he is reported to have said that he did not, but that he considered both the 'Umayyads and Ibn al-Muhallab to be corrupt, and wished that the earth would swallow the both of them together.[249]

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[245] See Ibn Kathīr, *al-Bidāya*, vol. 9, 101-103; al-Ṭabarī, *Ta'rīkh*, vol. 6, 556-8; Ibn al-Jawzī, *al-Muntaẓam*, vol. 6, 318; Ibn al-'Athīr, *al-Kāmil*, vol. 4, 280-1; Ibn al-Wardī, *Ta'rīkh*, vol. 1, 170-1. Sa'īd was executed for his participation in the rebellion, although he was killed more than ten years after the fact. The execution of Sa'īd is lamented by Muslim sources. See, for instance, Ibn 'A'tham, *al-Futūḥ*, vol. 4, 115-122.

[246] See al-Dhahabī, *Siyar*, vol. 3, 402, 404. According to some reports, because of 'Anas' highly revered status, 'Abd al-Malik ordered al-Ḥajjāj to apologize to 'Anas.

[247] Ibn Taymiyya, *Minhāj*, 241. Al-Ḥasan is reported to have cursed al-Ḥajjāj to his face but then retracted when his life was threatened; Ibn al-Jawzī, *al-Muntaẓam*, vol. 6, 250.

[248] Ibn al-'Athīr, *al-Kāmil*, vol. 4, 342-343; Ibn 'A'tham, *al-Futūḥ*, vol. 4, 242-58. Ibn al-Wardī, *Ta'rīkh*, vol. 1, 173-4, praises Ibn al-Muhallab and his family. See, generally on the rebellion, Kennedy, *The Prophet*, 107-108. On the significance and popularity of this rebellion, see Marin-Guzman, *Popular Dimensions*, 32-33.

[249] Ibn Khallikān, *Wafayāt*, vol. 6, 304. In Ibn al-Jawzī, *al-Muntaẓam*, vol. 7, 68, al-Baṣrī mocks the idea that Ibn al-Muhallab is calling for the observance of the Qur'ān and *Sunna*, and observes that until recently, al-Muhallab was serving the 'Umayyads, and supporting their corrupt behavior. Al-Baṣrī also makes it clear that he holds the 'Umayyads responsible for pillaging Medina, killing the Prophet's family

Zayd b. 'Alī, another member of the Prophet's family, rebelled against the 'Umayyads in Kūfa in 122/740, but was easily defeated, killed and crucified. His son Yaḥyā was executed after a short-lived rebellion in 125/742. While these seem to have been relatively minor rebellions without the involvement of many jurists, the moral impact of the killing of these descendants of the Prophet was considerable.[250] One notable jurist who is reported to have supported Zayd b. 'Alī's rebellion is Abū Ḥanīfa (d. 150/678), the founder of the Ḥanafī school of thought. The reports on Abū Ḥanīfa's exact relationship to Zayd's rebellion are contradictory. All of the reports concur that he sympathized with Zayd's revolt but disagree on the reason that he was not able to join the actual fighting. According to one report, Zayd asked Abū Ḥanīfa for his *bay'a*; Abū Ḥanīfa said that if he did not know that people would betray Zayd and allow him to be killed, he (Abū Ḥanīfa) would have joined Zayd. Abū Ḥanīfa, however, supported Zayd with a considerable sum of money. According to another report, Abū Ḥanīfa was unable to join Zayd because of an illness, and yet, in another version, Abū Ḥanīfa was unable to join the revolt because he was responsible for many trusts. Abū Ḥanīfa asked the jurist Ibn Abī Laylā (d. 148/765) to take over the responsibility of the trusts, but Ibn Abī Laylā refused. Unable to find anyone who would take responsibility for the trusts, Abū Ḥanīfa had no choice but not to join the battle, but whenever he would recall the death of Zayd he would cry.[251] Certainly, these reports are, for the most part, ahistorical but it would not be surprising if Abū Ḥanīfa did, in fact, sympathize with Zayd's rebellion but refrained from a public

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and destroying the Ka'ba. For the polemics between Ibn al-Muhallab and al-Baṣrī, see al-Ṭabarī, *Ta'rīkh*, vol. 6, 609. In al-Ṭabarī, al-Baṣrī is reported, as a matter of principle, to be opposed to Muslims killing each other.

[250] On these events, see Ibn Kathīr, *al-Bidāya*, vol. 9, 342-344 & vol. 10, 6-7; Ibn al-'Athīr, *al-Kāmil*, vol. 4, 452-456, 471-472; Ibn al-Jawzī, *al-Muntaẓam*, vol. 7, 218-219, 243-244; Ibn 'A'tham, *al-Futūḥ*, vol. 4, 313-325; Ibn al-Wardī, *Ta'rīkh*, vol. 1, 175. Both individuals were crucified then burned, and prisoners from the rebellion were executed.

[251] See al-Makkī, *Manāqib*, 267. It is also reported that Abū Ḥanīfa would claim that the people of Syria did not like him because if he would have been alive in earlier days, he would have joined 'Alī against Mu'āwiya, and the people of *ḥadīth* did not like him because of his love for *ahl al-bayt*. Ibid., 275, 344.

endorsement because he was sure that it would fail. A few years later, Yazīd b. Hubayra, the avid Qaysī supporter of the Marwānids, ordered Abū Ḥanīfa to assume a judicial position in Kūfa. This would have been a valuable symbolic gesture in favor of the legitimacy of the 'Umayyads. Abū Ḥanīfa refused to do so, and as a result, was tortured. According to some reports, it was a fellow jurist, the same Ibn Abī Layla referred to above, who recommended that Abū Ḥanīfa receive four hundred lashes.[252]

The legitimacy of the 'Umayyads, by this time, had become very problematic as they increasingly relied on brute force to suppress rebellion and maintain their power.[253] In 127/744, Marwān b. Muḥammad (al-Ḥimār), the 'Umayyad, overthrew Ibrāhīm b. al-Walīd (r. 126/744 - 127/744) and took power, but he immediately confronted widespread rebellions by the Khawārij, among them the rebellions of al-Ḍaḥḥāk b. Qays and Abū Ḥamza al-Khārijī. Both rebellions were fairly serious; al-Ḍaḥḥāk managed to occupy Mosul, and Abū Ḥamza occupied Medina for a period, before they were defeated and killed.[254] Furthermore, a serious rebellion, known as the Ja'farid rebellion, was launched from Kūfa by 'Abd Allāh b. Mu'āwiya, a descendant of Ja'far, 'Alī b. Abī Ṭālib's brother. The rebellion was supported by various parties, and it spread to Persia before it was crushed in 130/748. 'Abd Allāh escaped, but he was eventually seized and killed by Abū Muslim, the partisan and architect of the 'Abbāsid revolution.[255]

By the end of the 'Umayyad period, only the family of the Prophet could supply the necessary basis for legitimacy.[256] None of the 'Alid revolts had succeeded in overthrowing the 'Umayyads, but the 'Alids' cause continued to enjoy a high degree of popularity, particularly in Kūfa. But it was the 'Abbāsids, who successfully spread their propaganda in Khurāsān, who were able to overthrow the 'Umayyads.[257] The 'Abbāsid revolution was officially started by Abū Muslim in the Khurāsānī capital of Marv in 130/748.[258] When the 'Umayyads became aware that Abū Muslim was courting Ibrāhīm al-'Imām, a descendent of 'Alī's brother 'Abd Allāh, they executed Ibrahīm in 132/749.[259] In the same year, however, the Khurāsānīs were able to capture Kūfa from the 'Umayyads, and the issue of who should become the spiritual leader of the 'Abbāsids presented itself. Compared to the 'Alids, the 'Abbāsid's claim to legitimacy was problematic. The 'Abbāsids descended from al-'Abbās, the Prophet's uncle, whose conversion to Islam was doubtful.[260] According to some reports, certain members of the 'Abbāsid movement, such as Abū Salma al-Khallāl in Kūfa, wished to offer the leadership of the 'Abbāsids to the 'Alid branch of the family, but these attempts failed.[261] Instead,

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[252] Ibid., 306-307. Also see, Ibn Kathīr, *al-Bidāya*, vol. 10, 110.

[253] See Blankinship, *The End*, 21, 191; Shaban, *Islamic*, 144, 168. On these events as precursors to the 'Abbāsid revolution, see Lassner, *Islamic Revolution*, 89.

[254] Al-Ṭabarī, *Ta'rīkh*, vol. 7, 174-175, 188-189; Ibn Kathīr, *al-Bidāya*, vol. 10, 35; Ibn al-Jawzī, *al-Muntaẓam*, vol. 7, 266, 277-78; Ibn al-'Athīr, *al-Kāmil*, vol. 5, 12-14, 21-22, 39-40. Numerous rebellions by the Khawārij took place in the years preceding the fall of the 'Umayyads, see Marin-Guzman, *Popular Dimensions*, 67.

[255] Al-Ṭabarī, *Ta'rīkh*, vol. 7, 187-188; Ibn Kathīr, *al-Bidāya*, vol. 10, 35-36; Ibn al-'Athīr, *al-Kāmil*, vol. 5, 36-38. Also see Lassner, *Islamic Revolution*, 97.

[256] Kennedy, *The Prophet*, 116.

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[257] See Marin-Guzman, *Popular Dimensions*, 92; Moshe Sharon, *Black Banners from the East: The Establishment of the 'Abbāsid State Incubation of a Revolt* (Jerusalem: The Hebrew University, 1983), 51-54. On the role of 'Abbāsid leadership in Kūfa, see Lassner, *Islamic Revolution*, 86-87.

[258] On the gradual and prolonged process that resulted in the 'Abbāsid revolution, see Lassner, *Islamic Revolution;* Marin-Guzman, *Popular Dimensions*; Moshe Sharon, *Black Banners*; Idem, *Revolt: The Social and Military Aspects of the 'Abbāsid Revolution* (Jerusalem: The Hebrew University, 1990).

[259] There are also other reports as to what exactly happened to Ibrāhīm al-'Imām. A common report is that a letter from Ibrāhīm to Abū Muslim encouraging him to slaughter the 'Umayyads was intercepted. Ibrāhīm was imprisoned for a period and then killed in prison. Another report, which Ibn Kathīr considers to be the most authentic, is that Marwān heard that Abū Muslim and his followers referred to Ibrāhīm as the caliph, so he ordered his execution. See Ibn Kathīr, *al-Bidāya*, vol. 10, 41-42; al-Ṭabarī, *Ta'rīkh*, vol. 7, 219-220; Ibn al-Jawzī, *al-Muntaẓam*, vol. 7, 266, 277-78; Ibn al-'Athīr, *al-Kāmil*, vol. 5, 72-73; al-Mas'ūdī, *Murūj*, vol. 2, 192-3.

[260] See on this issue, Kennedy, *The Prophet*, 124-127. In order to address the problem of legitimacy, the 'Abbāsids invented various traditions that connected them either to the 'Alid branch or to the Prophet. In one tradition, it is claimed that Abū Hāshim (98/716), the descendant of 'Alī, on his deathbed, transferred the 'Alid right to rule to Muḥammad b. 'Alī b. al-'Abbās. In the second tradition, it is claimed that the Prophet gave descendants of al-'Abbās the right to rule, see al-Ṭabarī, *Ta'rīkh*, vol. 7, 212. On these and other 'Abbāsid apologetics, see Lassner, *Islamic Revolution*, 3-36; Idem, *The Shaping of 'Abbāsid Rule* (Princeton: Princeton University Press, 1980), 60-61.

[261] Ibn Kathīr, *al-Bidāya*, vol. 10, 42. It is also reported that the leadership was, in fact, offered to Ja'far al-Ṣādiq (d. 148/765). Modarressi, *Crisis and Consolidation*, 7; Shaban, *Islamic History*, 186-7.

'Ibrāhīm's brother, Abū al-'Abbās (known as al-Saffāḥ) was given the oath of allegiance in Kūfa and declared a Caliph by his party. Although the 'Abbāsid revolution seems to have been quite popular, if Marwān was able to defeat Abū al-'Abbās, this too would have gone down in history as yet another failed rebellion. However, the out-numbered 'Abbāsids defeated the Qaysī supporters of Marwān in the Battle of Zāb (132/750), and this effectively brought an end to the 'Umayyad dynasty.

Significantly, the 'Abbāsids, like the 'Umayyads, came to power through a usurpation or a revolt.[262] Yet, for the most part, their caliphate was accepted by the jurists. This point cannot be under-emphasized; the idea of a revolt as a means to power was neither alien nor abhorrent to Muslim jurists. Furthermore, the precedents available to Muslim jurists did not necessitate that a rebel be considered a traitor or malevolent person. This does not mean that the jurists necessarily counseled or encouraged rebellion. Rather, the precedents of early Islamic history did not, of necessity, create a legal culture in which rebels were unequivocally despised or condemned. The major difference, however, between the 'Umayyad period and the early 'Abbāsid era was that the corporate identity of jurists and their culture had become more developed and distinct. The *'ulamā'* were developing a jurisprudential corpus over which they could speak authoritatively. This gave the *'ulamā'* a vested interest in the institutions of law and order, but it also permitted them a certain degree of distance from the institutions of politics and power. I will return to this point again later.

Shortly after coming to power, the 'Abbāsids started a massive massacre of the Marwānid family and the crucifixion of some of its members.[263] After a violent power struggle, Abū Ja'far al-Manṣūr (r. 137/754 - 159/775) became the second 'Abbāsid caliph, only to confront a serious rebellion by members of the 'Alid family.[264] In 145/762 Muḥammad b. 'Abd Allāh b. al-Ḥasan, known as al-Nafs al-Zakiyya, "the pure soul", for his piety, rebelled in Medina and his brother, 'Ibrāhīm, rebelled in Baṣra. The 'Abbāsids were aware of the plotting of the rebellion and kept Kūfa, the 'Alid traditional base of support, under careful watch. Ultimately, the rebellions, through the use of Syrian and Khurāsāni troops, were crushed and al-Nafs al-Zakiyya and his brother were killed.[265] Nonetheless, the rebellions are notable because of their popularity, particularly among the jurists.[266] Some jurists seemed to have joined the fighting, but many, such as Abū Ḥanifa, 'Abd Allāh b. Abī Sabra, and Mālik b. 'Anas, lent financial or moral support.[267]

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[262] See Lassner, *Islamic Revolution*, 7.

[263] On the unprecedented scale of the massacre, see Lassner, *Islamic Revolution*, 136-7; Marin-Guzman, *Popular Dimensions*, 100-101; Zaman, *Religion and Politics*, 72-73; Ibn Qutayba, *al-Imāma*, 145-148; Ibn al-'Athīr, *al-Kāmil*, vol. 5, 78-9; al-Mas'ūdī, *Murūj*, vol. 2, 194-195. Arguably, this was the first time the extermination of an entire clan was attempted.

Mālik b. 'Anas, the famous founder of the Mālikī school, was asked about the legality of giving the *bay'a* to al-Nafs al-Zakiyya. He responded that it was legal because the *bay'a* given to the caliph al-Manṣūr was obtained under duress and therefore, was invalid. Effectively, Mālik suggested that it was legal to join the rebellion. Interestingly, however, Mālik seems to have stayed home and did not take part in the actual fighting.[268]

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[264] There were other rebellions as well: 'Abd Allāh b. 'Alī, al-Manṣūr's uncle revolted but was defeated by Abū Muslim. Al-Manṣūr imprisoned 'Abd Allāh and later had him killed. Al- Manṣūr also killed Abū Muslim. These events are analyzed in Lassner, *The Shaping*, 39-57. On the killing of Abū Muslim, see al-Mas'ūdī, *Murūj*, vol. 2, 230-2; on the killing of 'Abd Allāh, see Ibid., 241-2. Al-Mas'ūdī reports that the jurist Ibn Abī Layla approved of the killing of 'Abd Allāh while the jurist Ibn Shubruma advised against it.

[265] See Kennedy, *The Prophet*, 132-133. Also see Lassner's detailed treatment of the mechanics of the rebellion in *The Shaping*, 69-79.

[266] Abū al-Faraj al-Iṣfahānī, *Maqātil al-Ṭālibīyyin*, ed. Sayyid 'Aḥmad Ṣaqr (Beirut: Dār al-Ma'rifa, n.d), 359, claims that all the jurists joined the rebellion. Ibn al-Wardī, *Ta'rīkh*, vol. 1, 186, claims that four thousand jurists supported the rebellion. This number is most probably exaggerated. See also Ibn Taymiyya, *Minhāj*, vol. 2, 243. Al-Mas'ūdī, *Murūj*, vol. 2, 233 notes that many principalities gave their *bay'a* to al-Nafs al-Zakiyya. He also notes that in trying to convince the Khurāsānīs to fight the rebels, al-Manṣūr referred to Kūfa as a place of *fitan* and strife. Ibid., 237-238.

[267] See al-Iṣfahānī, *Maqātil*, 283, 361, 364-365. On Ibn Abī Sabra, see Muḥammad b. Khalaf b. Ḥayyān Wakī', *'Akhbār al-Quḍāh* (Beirut: 'Ālam al-Kutub, n.d.), vol. 1, 201. Zaman, *Religion and Politics*, 73-75, argues that several jurists refrained from getting involved in the rebellion. This is certainly true. See Ibn Sa'd, *al-Ṭabaqāt*, vol. 7, 264, for an 'Abd Allāh b. 'Awn b. 'Arṭabān who locked himself up at home and refused to get involved. Also see Wakī', *'Akhbār*, vol. 1, 196-197. Ja'far al-Ṣādiq also refrained from joining the revolt. See Modarressi, *Crisis*, 8. But this does not mean the rebellion was not popular among jurists.

[268] Ibn Kathīr, *al-Bidāya*, vol. 10, 86; al-Ṭabarī, *Ta'rīkh*, vol. 7, 281; Ibn al-Jawzī, *al-Muntaẓam*, vol. 8, 64.

Moreover, it is reported that after the rebellion, Mālik isolated himself and allegedly refused to attend any public gatherings until he died.[269] Nevertheless, al-Manṣūr's cousin, who was Medina's governor, had Mālik beaten and flogged for his views on duress, and possibly, for supporting the rebellion.[270]

The fate of another jurist, Abū Ḥanīfa, was the subject of various reports, with most of the disagreement focusing on whether he was poisoned or tortured to death. Reportedly, Abū Ḥanīfa was very vocal in support of Ibrāhīm's rebellion and continued to speak favorably of Ibrāhīm even after the rebellion ended, and so al-Manṣūr had Abū Ḥanīfa poisoned. Other reports provide that al-Manṣūr never forgave Abū Ḥanīfa for his position on the rebellions. As proof of his loyalty, al-Manṣūr ordered Abū Ḥanīfa to accept a judicial position, but when he refused, al-Manṣūr had him imprisoned and tortured to death.[271] Some reports even claim that al-Manṣūr had Abū Ḥanīfa crucified, and had a dog buried with him.[272]

In what is definitely an apocryphal tradition, the caliph al-Manṣūr requested the presence of Abū Ḥanīfa. When Abū Ḥanīfa arrived, he found Ibn Abī Layla, the judge of

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[269] Ibn Kathīr, *al-Bidāya*, vol. 10, 180. The authenticity of this report is doubtful. Ibn al-'Athīr, *al-Kāmil*, vol. 9, 45, reports that he isolated himself at home until al-Nafs al-Zakiyya was killed.

[270] There is some disagreement as to why he was punished. According to one report, he was asked whether a divorce pronounced under duress was valid. He said it was not, and as a result, was flogged. It is also reported that those who were envious of him conveyed his views on duress and divorce to the governor, and thus was flogged. See al-Dhahabī, *Siyar*, vol. 8, 79-80; Ibn al-Jawzī, *al-Muntaẓam*, vol. 9, 44; Ibn al-Wardī, *Ta'rīkh*, vol. 1, 196. A jurist's views on duress and divorce had serious political implications. The pivotal issue was the legality of acts performed under coercion. Such acts could include a coreced *bay'a* or an oath of allegiance to a ruler.

[271] In some reports Abū Ḥanīfa eventually accepted the judicial position due to torture, but died a few days later. Other reports claim that after the rebellion, al-Manṣūr wished to test Abū Ḥanīfa's loyalty. He sent a man to ask Abū Ḥanīfa if it was legal to obey the caliph if the caliph ordered the killing of an innocent victim. Abū Ḥanīfa gave a negative response, so al-Manṣūr had Abū Ḥanīfa poisoned. Most of the reports are in al-Makkī, *Manāqib*, 299-305. Ibn al-Jawzī, *al-Muntaẓam*, vol. 8, 143, obviously did not approve of Abū Ḥanīfa because Ibn al-Jawzī took the trouble to point out the many occasions where Abū Ḥanīfa contravened the Prophet's *sunna*. Nonetheless, Ibn al-Jawzī reproduces many of the reports. Al-Dhahabī, *Siyar*, vol. 6, 401-403, mentions most of the reports and calls Abū Ḥanīfa the martyr. Ibn al-Wardī, *Ta'rīkh*, vol. 1, 188, reports that Abū Ḥanīfa died in prison.

[272] Al-Makkī, *Manāqib*, 304-305.

Kūfa, and Ibn Shubruma, the judge of Baghdād, present with the caliph. Al-Manṣūr asked Abū Ḥanīfa about the liability of the rebellious Khawārij for the life and property they destroyed. Abū Ḥanīfa responded by saying, "Ask the two judges first." One of the judges said they were liable, and the other said they were not. Abū Ḥanīfa said they are both wrong; because the Khawārij are liable only for what they destroyed before they commenced their rebellion. But they are not liable for what they destroyed *in the course* of their rebellion. Reportedly, at that point, al-Manṣūr had to acknowledge Abū Ḥanīfa's juristic profficiency and superior knowledge.[273] While it is quite plausible that Abū Ḥanīfa played a role in the development of the law of rebellion, this report is too staged to warrant any credibility. Furthermore, the position reportedly articulated by Abū Ḥanīfa, as discussed later, is too precise and developed to be historical. Nonetheless, it is a good representation of the developing interest in the law of rebellion and its authentication. Despite Abū Ḥanīfa's personal history, and perhaps because of his personal history,[274] reports were circulated claiming that he advised people to refrain from getting involved in *al-fitna*.[275] Yet, other reports have Abū Ḥanīfa saying that if he lived at the time of 'Alī, he would have fought on 'Alī's side.[276] These reports can only be seen as manifestations of the rising interest in the debate on the status of rebels and the law of rebellion.

A report that perhaps better reflects the status of the developing discourse on the law of rebellion occurs in the context of the polemics between al-Manṣūr and al-Nafs al-Zakiyya. Al-Manṣūr wrote to al-Nafs al-Zakiyya citing the *ḥiraba* verse, and threatened to have al-Nafs al-Zakiyya killed, crucified or amputated in accordance with the specifications of the verse. However, again pursuant to the verse, al-Manṣūr promised to pardon al-Nafs al-Zakiyya, his family, and followers if he would quit the rebellion before being captured. Al-Manṣūr also promised to grant him money and property and to release all the 'Alids in prison. Al-Nafs al-Zakiyya responded by saying that the 'Alids had a greater right to rule than the 'Abbasids, and promised to forgive al-Manṣūr and pardon him for the crimes he had committed except for the *ḥudūd* of God or any right that belonged to a Muslim or *dhimmī*. Al-Nafs al-Zakiyya also noted that al-Manṣūr's promises were worthless since he had betrayed his own followers, such as Abū Muslim, and al-Manṣūr's uncle.[277] Ultimately, al-Manṣūr was unable to enforce his threat because al-Nafs al-Zakiyya died in battle, but there are reports that his corpse and the corpses of his followers were crucified.[278] Significantly, at one point when 'Ibrāhīm, al-Nafs al-Zakiyya's brother, had the upper hand in battle over al-Manṣūr, consistent with 'Alī's conduct, 'Ibrāhīm ordered his troops not to pursue the fugitive.[279] Notably, however, al-Manṣūr considered al-Nafs al-Zakiyya a *muḥārib* deserving of the treatment specified in the Qur'ānic verse. Evidently, both the *ḥirāba* verse and the conduct of 'Alī were being employed and manipulated in the polemics of the political arena. As noted earlier, these precedents became central in the development of *'aḥkām al-bughā*.

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[273] Ibid., 184.

[274] See, on his life, Gibb and Kramers, *Shorter Encyclopedia of Islam*, 9-10.

[275] Al-'Ayinī, *al-Bināya*, vol. 6, 740; al-Sarakhsī, *al-Mabsūṭ*, vol. 10, 124.

[276] Al-Makkī, *Manāqib*, 275, 345.

The tension raised by the above mentioned rebellions, and by the problem of how to perceive or deal with rebels, is well-illustrated in a report about Muḥammad b. 'Imrān al-Ṭalḥī, the judge of Medina at the time of al-Manṣūr. Ibn 'Imrān failed to join the rebellion of al-Nafs al-Zakiyya. When the rebellion was defeated, al-Manṣūr ordered his agents in Medina to arrest anyone suspected of supporting the rebellion (*'amara bi 'aṣḥābihi yultaqaṭuna fī kulli wajhin*). Nonetheless, the arrest of political opponents was hardly a scientific process, therefore, there was a sense of general fear and insecurity. Ibn 'Imrān, the judge, overcome by terror, would pray: "May others be arrested and not me (*'allāhumma ḥawālaynā wa lā 'alaynā*)."[280] The jurist 'Abd Allāh b. 'Abd al-'Azīz al-'Umarī, who joined the rebellion with his sons, would comment, "Have you seen anyone more ignorant than this judge? He prays for harm to befall Muslims?"[281] There was no suggestion of rancor or hate on the part of Ibn 'Imrān against the rebels, only fear for his personal security. On the other hand, those being harmed were perceived as fellow Muslims, and an unmitigated desire to distance oneself from them was seen as a sign of ignorance and lack of piety. It was exactly these dynamics that played themselves out in the articulation of the discourse on rebellion.

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[277] Ibn Kathīr, *al-Bidāya*, vol. 10, 87-88; Ibn al-Jawzī, *al-Muntaẓam*, vol. 8, 64-65; Ibn al-'Athīr, *al-Kāmil*, vol. 5, 151-152; al-Ṭabarī, *Ta'rīkh*, vol. 7, 284-285.

[278] Ibn al-Jawzī, *al-Muntaẓam*, vol. 8, 68; Ibn al-'Athīr, *al-Kāmil*, vol. 5, 161.

[279] Al-Ṭabarī, *Ta'rīkh*, vol. 7, 325.

After al-Manṣūr, tribal and Khawārij rebellions continued to plague the reign of his successor al-Mahdī (r. 158/775 - 169/785). Al-Mahdī followed a policy of reconciliation with the 'Alids, releasing them from prison, and offering them financial grants.[282] His reign was relatively peaceful with minimal 'Alid opposition.[283] In 167/783, he initiated an inquisition directed mostly, but not exclusively, at those who advocated Manichaean doctrines (the *zanādiqa*).[284] Nonetheless, several 'Alid sympathizers were accused of heresy and killed.[285] Interestingly, al-Mahdī dealt with some rebels in a fashion reminiscent of the verse on *ḥiraba*,[286] and although upon coming to power he granted a general amnesty to all political prisoners, he exempted from this amnesty those who "caused corruption on the earth."[287]

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[280] The literal meaning of the phrase is: "God, may such or such fall around us and not on us." The statement was allegedly made by the Prophet when the people of Medina suffered from persistent heavy rains. Reportedly, the Prophet prayed that the rain would fall around Medina and not on Medina.

[281] Wakī', *'Akhbār*, vol. 1, 196-197.

[282] Al-Ya'qūbī, *Ta'rīkh*, vol. 2, 394; Kennedy, *The Prophet*, 137; M.A. Shaban, *Islamic History: A New Interpretation* 2 (Cambridge: Cambridge University Press, 1976), 21.

[283] The 'Alid, 'Īsā b. Zayd b. 'Alī attempted to organize a rebellion against al-Mahdī without much success. He went into hiding until he died. Al-Mahdī reportedly also had the 'Alid, 'Alī b. al-'Abbās b. al-Ḥasan, imprisoned and then poisoned for suspected seditious activity. See al-Iṣfahānī, *Maqātil*, 405-428, 403-404. On Sufyān al-Thawrī's opposition to al-Mahdī, see below.

[284] Al-Ṭabarī, *Ta'rīkh*, vol. 8, 409; Ibn Kathīr, *al-Bidāya*, vol. 10, 153; al-Ya'qūbī, *Ta'rīkh*, vol. 2, 400; Ibn al-Wardī, *Ta'rīkh*, vol. 1, 191-3. Ibn al-Jawzī, *al-Muntaẓam*, vol. 8, 235, reports that in 163/779, al-Mahdī had several people accused of heresy killed and crucified. On this inquisition, see Mahmood Ibrahim, "Religious Inquisition as Social Policy: The Persecution of the *Zandiqa* in the Early Abbasid Caliphate," *Arab Studies Quarterly* 16, no. 2 (1994): 53-72.

[285] Ibrahim, "Religious Inquisitions," 56. Ibrahim demonstrates that the inquisition was brought about because of a changing socio-political culture. It was also used against political opponents who were summarily killed.

It was not until the reign of al-Hādī (r. 169/785 - 170/786) that there was another serious 'Alid rebellion. Al-Hādī had followed a hard-line policy towards the 'Alids, cutting off their allowances and keeping them under close surveillance. According to some sources, this policy was the reason the 'Alid, al-Ḥusayn b. 'Alī, Ṣāḥib al-Fakhkh, rebelled in Medina in 169/786.[288] But his rebellion was short-lived and he was trapped and killed on his way to Mecca.[289] Sunnī sources report that the caliph, al-Hādī, did not approve of the killing of this 'Alid, if true, probably because he realized that this would generate more propaganda against the 'Abbāsids.[290] Nonetheless, the relative paucity of the support for his rebellion[291] is an indication that the 'Abbāsids had succeeded in consolidating their power base, and in integrating many jurists within the institutions of government.[292] Many prominent jurists such as Layth b. Sa'd (d. 175/791), Sharīk al-Nakha'ī (d. 187/803), al-Qāḍī Abī Yūsuf (d. 182/798), and Muḥammad b. al-Ḥasan al-Shaybānī (d. 187/803) accepted judicial positions while others enjoyed the patronage of the caliph.[293] This was especially true during the reign of the fifth 'Abbāsid caliph, Hārūn al-Rashīd (r. 170/786 -193/809).

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[286] For example, in 160/776, Yūsuf b. 'Ibrāhīm rebelled in Khurāsān, his hands and feet were amputated and he was crucified, see Ibn al-Jawzī, *al-Muntaẓam*, vol. 8, 235; al-Ya'qūbī, *Ta'rīkh*, vol. 2, 397.

[287] Ibn al-Jawzī, *al-Muntaẓam*, vol. 8, 227; Ibn Kathīr, *al-Bidāya*, vol. 10, 133.

[288] Al-Ya'qūbī, *Ta'rīkh*, vol. 2, 404.

[289] Ibn Khayyāṭ, *Ta'rīkh*, vol. 2, 478; al-Mas'ūdī, *Murūj*, vol. 2, 258-259.

[290] Ibn al-Jawzī, *al-Muntaẓam*, vol. 8, 310; Ibn al-'Athīr, *al-Kāmil*, vol. 5, 268; Ibn al-Wardī, *Ta'rīkh*, vol. 1, 193-4.

[291] Al-Ya'qūbī, *Ta'rīkh*, vol. 2, 405, reports that only five hundred people fought with this 'Alid.

[292] Kennedy, *The Prophet*, 140.

[293] See, on this point, Zaman, *Religion and Politics*, 147-166.

Hārūn al-Rashīd came to power through a *coup d'état* arranged by his supporters from the Barmakid family. His supporters were even suspected of having poisoned the previous caliph. There were several serious rebellions during his reign, such as the Khārijī rebellion in Ḥijāz by Walīd b. Ṭarīf (in 178/794) and the tribal rebellion in Samarqand by Rafī' b. Layth (in 189/804). Nevertheless, his reign enjoyed considerable stability, and it was the last period in which central Muslim territory from North Africa to the Sind, in the east, was united under the control of a caliph.[294] Hārūn al-Rashīd, however, remained apprehensive about 'Alid contenders, and although many jurists served in his administration, his relationship with some of the most prominent jurists remained problematic. For example, in the short-lived rebellion of al-Ḥusayn b. 'Alī, Ṣāḥib al-Fakhkh, one of the 'Alīd's supporters was Yaḥyā b. 'Abd Allāh b. al-Ḥasan (later known as al-Daylamī) who, when 'Ali was killed, escaped to the mountains of Daylam near the Caspian sea. Al-Daylamī seems to have been quite popular and many people in Mecca, Medina, Iraq, Yemen and Egypt gave him their allegiance. Several jurists, even before Hārūn al-Rashīd came to power, had either sympathized or pledged their allegiance to al-Daylamī. Among these jurists was the founder of the Shāfi'ī school, Muḥammad b. 'Idrīs al-Shāfi'ī (d. 205/820).[295] Evidently, al-Daylamī's popularity distressed Hārūn al-Rashīd considerably, so he persuaded al-Daylamī to leave his hideout in the mountains by issuing him a guarantee of safe conduct. Al-Daylamī arrived in Baghdād and is said to have been allowed to visit Medina and pay off al-Ḥusayn b. 'Alī's debts.[296]

Before long, Hārūn al-Rashīd started conspiring to have al-Daylamī killed. He accused al-Daylamī of treason and of continuing to agitate against him in Baghdād and Medina.[297] Therefore, al-Rashīd argued that al-Daylamī's guarantee of safe conduct was invalid, and that he (al-Rashīd) was not obliged to honor it. Importantly, Hārūn al-Rashīd sought the support of the prominent jurists of his time for this rather unusual position. He reportedly asked several jurists about whether it was legal to violate the guarantee of safe conduct. Some jurists insisted that it was not legal while others obliged the caliph, and still others refused to respond.[298] Among the jurists asked was al-Shaybānī, the famous student of Abū Ḥanīfa. Al-Shaybānī insisted that the guarantee of safe conduct was legally binding, and could not be revoked. Hārūn al-Rashīd, however, continued to argue with al-Shaybānī but to no avail. In debating al-Rashīd, at one point al-Shaybānī reportedly commented, "What if [the man] was a *muḥārib* and he repented, wouldn't he be safe then?"[299]

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[294] Kennedy, *The Prophet*, 141-148.

[295] Abū al-Falāḥ 'Abd al-Ḥayy b. al-'Imād, *Shadharāt al-Dhahab fī 'Akhbār man Dhahab* (Beirut: Dār al-Kutub al-'Ilmiyya, n.d.), vol. 1, 338.

[296] Ibid., vol. 1, 339.

[297] On the conspiracy to have al-Daylamī killed, see al-Iṣfahānī, *Maqātil*, 471-479.

It is difficult to understand the exact sense in which the word *muḥārib* is used in this context. However, at a minimum, al-Shaybānī distinguished between al-Daylamī and a fighter or, perhaps, a bandit. Al-Shaybānī could be arguing that al-Daylamī, at one time, was a *muḥārib* who has now repented and so cannot be molested, or alternatively, he could be arguing that al-Daylamī fell in a legal category separate and apart from that of a *muḥārib*.[300] Furthermore, al-Shaybānī could also be arguing that even under the worst of circumstances, if al-Daylamī was a *muḥārib* his repentance would still be accepted, and the promises given to him would be honored. In any event, Hārūn al-Rashīd was not convinced, and he solicited the views of the Chief judge of Raqqa, Abū al-Bakhtarī Wahb b. Wahb. Obliging the caliph, Abū al-Bakhtarī immediately declared the guarantee of safe conduct invalid. Hārūn al-Rashīd proclaimed, "You are the chief judge, and so you are more knowledgeable [than al-Shaybānī]." The paper on which the guarantee was written was torn up and it is reported that Abū al-Bakhtarī spat on it. Al-Daylamī was then seized and killed in 176/793.[301]

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[298] Ibn al-'Imād, *Shadharāt*, vol. 1, 339; al-Iṣfahānī, *Maqātil*, 479-480, reports that the jurist Mālik b. Anas was among the jurists consulted on the matter. Mālik said the guarantee of safe conduct could not be revoked.

[299] Ibn al-Jawzī, *al-Muntaẓam*, vol. 9, 16-17; Ibn al-'Athīr, *al-Kāmil*, vol. 5, 291; al-Ṭabarī, *Ta'rīkh*, vol. 8, 450. Also see the discussion in Wakī', *'Akhbār*, vol. 1, 249, which is somewhat different than the above sources.

[300] I am not at all discounting the likelihood that al-Shaybānī never uttered this statement. Rather, it was later attributed to him to demonstrate his keen knowledge of law as compared to the caliph's ignorance.

As might be expected, Abū al-Bakhtarī was generously rewarded for his loyalty and in 192/807, he was made the governor and the judge of Medina. All the judges who declared the safe conduct valid, reportedly, were dismissed, and al-Shaybānī was banned from issuing legal opinions for a period of time.[302] But al-Shaybānī managed to regain the caliph's favor, and was appointed to the position of a judge in Raqqa in 180/796.[303] He was dismissed in 187/803, reportedly because of lingering distrust as a result of the al-Daylamī affair. However, in 189/804 he was ordered by Hārūn al-Rashīd to accompany him on an expedition to suppress a rebellion in Samarqand by Rāfi' b. Layth, a grandson of the last 'Umayyad governor of the province. Ironically, al-Shaybānī died on the way in Rayy.[304]

Even if al-Shaybānī regained the caliph's favor it does not necessarily mean that he became a representative of the interests of the state. It only meant that he now had a vested interest, but not a singular interest, in the institutions of the state. In all likelihood, al-Shaybānī was not an 'Alid sympathizer, and the reason for his position on the al-Daylamī affair had little to do with al-Daylamī himself. Al-Shaybanī was a representative of the emerging conception of law and order, but, even more, he was a representative of a developing legal culture with its own logic and corporate interests. However, this legal culture was neither cohesive nor uniform. Some of its prominent members were, in fact, 'Alid sympathizers, or at least, not partisans of the 'Abbāsids and their administration.[305] One of the most prominent jurists who seems to fall in this category is al-Shāfi'ī.

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[301] Ibn al-Jawzī, *al-Muntaẓam*, vol. 9, 16-17; Ibn al-'Athīr, *al-Kāmil*, vol. 5, 291; al-Ṭabarī, *Ta'rīkh*, vol. 8, 450. On different versions on how al-Daylami was killed, see al-Iṣfahānī, *Maqātil*, 481-482; Ibn al-'Imād, *Shadharāt*, vol. 1, 339. Some reports say he was starved or strangled to death in prison while other reports claim he was tortured to death. Ibn al-Wardī, *Ta'rīkh*, vol. 1, 195, reports that al-Rashīd treated al-Daylamī well, and then had him imprisoned. Al-Daylamī then died in prison. Interestingly, there are many traditions that are derogatory of Abū al-Bakhtarī. Some reports call him the "lying judge" while other reports say that he was detested by the jurists and the laity. Most of the reports focus on Abū al-Bakhtarī's desire to gain favor with the 'Abbāsids, see Wakī', *'Akhbār*, vol. 1, 252-253.

[302] Al-Iṣfahānī, *Maqātil*, 480. On Abū al-Bakhtarī also see, Wakī', *'Akhbār*, vol. 1, 243-244.

[303] Reportedly, al-Shaybanī was not happy about this appointment.

[304] Ibn Sa'd, *al-Ṭabaqāt*, vol. 7, 336-337. See also, Gibb and Kramers, *Shorter Encyclopedia of Islam*, 518-519; Majid Khadduri, trans., *The Islamic Law of Nations: Shaybānī's Siyar* (Baltimore: Johns Hopkins Press, 1966), 32-35.

As mentioned above, al-Shāfi'ī reportedly gave his allegiance to al-Daylamī, and in fact, al-Shāfi'ī was suspected of *tashayyu'* or of being a secret Shī'ī sympathizer.[306] For a jurist as influential as al-Shāfi'ī, he managed to keep a considerable distance from public office. Nonetheless, probably as a test of his loyalty, Hārūn al-Rashīd ordered al-Shāfi'ī to take office in Najrān, Yemen.[307] Before long, in 187/803 or 189/804, he was arrested with nine 'Alids and brought in chains before al-Rashīd in Raqqa while, reportedly, al-Shaybānī was present. Despite their vehement denials that they were plotting against al-Rashīd and, in the case of one of the accused, denials that they were even loyal to the 'Alids, al-Rashīd ordered the execution of the nine. Reportedly, al-Shaybānī stood silent, and neither condoned nor opposed the executions. However, al-Shaybānī did intervene to stop the execution of a fellow jurist, and al-Shāfi'ī's life was spared. Interestingly, al-Shafi'ī defended himself by arguing that he was just a jurist, and had nothing to do with the 'Alids. The import of al-Shāfi'ī's defense seems to have been that as a jurist he is unlikely to be involved in such political intrigues.[308] After the incident, al-Shafi'ī moved to Egypt, away from the center of politics in Iraq, and remained there until he died.

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[305] Even if a particular jurist was not a 'Alid sympathizer, as noted above, the members of the family of the Prophet, at least in first two centuries of Islam, continued to carry considerable moral weight. For example, Ja'far al-Ṣādiq (d. 148/765) was highly revered until his death, see Modarressi, *Crisis and Consolidation*, 6-7; also see, on al-Ṣādiq, Jamāl al-Dīn Abī al-Faraj b. al-Jawzī, *Ṣifat al-Ṣafwa*, ed. 'Abd al-Raḥmān al-Lādqī and Ḥayāh Shīḥā al-Lādqī (Beirut: Dār al-Ma'rifa, 1995), vol. 1, 496-502. Al-Iṣfahānī, *Maqātil*, 464, reports that Mālik b. Anas used to respect al-Daylamī, and that when al-Daylamī entered upon Mālik, Mālik would stand up and seat al-Daylamī next to him.

[306] Al-Dhahabī, *Siyar*, vol. 10, 58. The author vehemently denies this accusation.

[307] Ibn Kathīr, *al-Bidāya*, vol. 5, 263. See also, Gibb and Kramers, *Shorter Encyclopedia of Islam*, 512-513.

[308] Ibn al-'Imād, *Shadharāt*, vol. 1, 323; according to one report, the caliph did not know that al-Shāfi'ī was one of the apprehended suspects, and once al-Shaybānī verified that it was, in fact, al-Shāfi'ī who stood before the caliph, the caliph released him immediately. This is very unlikely, and in all probability the account was embellished to emphasize al-Shāfi'ī's esteemed position. In a different report, it was al-

The caliph al-Rashīd remained worried about 'Alid sympathies and imprisoned or assassinated several members of the 'Alid family.[309] Most notably, he arrested Mūsā b. Ja'far al-Kāẓim, the seventh Shī'ī imām, in Medina, imprisoned him in Iraq, and eventually had him killed in 183/799.[310] Al-Kāẓim was highly respected in his time and even later Sunnī sources mention him with considerable admiration and reverence.[311] Nevertheless, al-Rashīd's policy continued until his death. The events that ensued from the time of his death and leading up to the designation of 'Alī b. Mūsā al-Riḍā (d. 203/818), the eighth Shī'ī imām, as heir apparent by the caliph al-Ma'mūn (r. 198/813 - 218/833), proved to be very significant for the development of the discourse on rebellion.

One of al-Rashīd's sons, al-'Amīn (r. 193/809 - 198/813), became caliph immediately after his father's death. Before long, al-Ma'mūn, the governor of Khurāsān

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Shaybānī and Abū Yūsuf who conspired to get al-Shāfi'ī in trouble. They told the caliph that al-Shāfi'ī was an 'Alid sympathizer and that al-Shāfi'ī even considered himself qualified to be a caliph. Al-Dhahabī, *Siyar*, vol. 10, 78, alludes to this report but refuses to discuss it because, he says, it is a shameless lie. Of course, Abū Yūsuf could not have been involved in the incident because he was dead at the time (he died 183/799). The likelihood is that the report is a product of the later polemics between the Ḥanafī and Shāfi'ī schools of thought, and that it was intended as anti-Ḥanafī propaganda. Other reports maintain that al-Shaybānī and al-Shāfi'ī were good friends, and that al-Shaybānī used to lend or give books to al-Shāfi'ī, a sign of great admiration in the legal culture. These various reports are in Ibn al-'Imād, *Shadharāt*, vol. 1, 323. Ibn 'A'tham, *al-Futūḥ*, vol. 4, 403-8, asserts that al-Rashīd had never heard of al-Shāfi'ī when al-Shaybānī nominated al-Shāfi'ī to take the position in Yemen. Al-Rashīd interviewed al-Shāfi'ī who claimed to be knowledgeable in, among other things, law, medicine and astronomy. Al-Shāfi'ī then proceeded to give advice to al-Rashīd with such eloquence until al-Rāshīd came to tears, and, as a result, al-Rashīd appointed al-Shāfi'ī to the post at Yemen. When al-Rashīd heard that al-Shāfi'ī was supporting an 'Alid rebel, he became enraged and insisted on killing al-Shāfi'ī. (Ibn 'A'tham comments that the accusation against al-Shāfi'ī was simply untrue.) At any case, al-Shaybānī interceded on behalf of al-Shāfi'ī, arguing that if al-Rashīd killed al-Shāfi'ī, people would most likely think that he (al-Shaybānī) was responsible for the execution. But al-Rashīd would not hear of it, and blamed al-Shaybānī for nominating al-Shāfi'ī to the post in Yemen in the first place. When al-Shāfi'ī was brought before al-Rashīd, al-Rashīd angrily interrogated him. Al-Shāfi'ī defended himself by stating that everyone knows that the 'Alids expect the whole world to be their slaves, and it is highly implausible that he, a Qurayshī, would support an 'Alid. Al-Rashīd was impressed by this logic, and pardoned al-Shāfi'ī. However, al-Rashīd insisted that before pardoning al-Shāfi'ī, al-Shaybānī must get al-Shāfi'ī to admit that a commitment made under duress is binding. Initially, al-Shāfi'ī resisted, but eventually he gave in. Reportedly, al-Rashīd commands al-Shāfi'ī not to release people from commitments made under duress, and al-Shāfi'ī responds, "Your order is my command." This report is too staged to be authentic.

[309] See al-Iṣfahānī, *Maqātil*, 487-506; he lists eight prominent members.

[310] Al-Iṣfahānī, *Maqātil*, 499-505; Ibn al-Wardī, *Ta'rīkh*, vol. 1, 197-8. Modarressi, *Crisis and Consolidation*, 10. Al-Mas'ūdī, *Murūj*, vol. 2, 280, says he was killed in 186 AH.

[311] For example, see Ibn Khallikān, *Wafayāt*, vol. 5, 308-310; Ibn al-Jawzī, *Ṣifa*, vol. 2, 508-510; Ibn al-Wardī, *Ta'rīkh*, vol. 1, 197-8.

and al-'Amīn's brother, rebelled. The resulting civil war was extremely violent, and led to the siege of Baghdād in 196/812. Al-'Amīn armed the commoners of the city, often referred to as the *'ayyārūn* (vagabonds), and street-to-street fighting ensued; Baghdād was also blockaded and bombarded with mangonels. Even after al-'Amīn was killed, fighting continued, and al-Ma'mūn was not able to enter Baghdād until 204/819.[312] During the chaos of these years, one of the most significant 'Alid rebellions broke out in Kūfa in 199/815. The bloody civil war resulted in a general state of insecurity and chaos. According to some sources, a rumor spread that al-Faḍl b. Sahl, al-Ma'mūn's close advisor and military leader who was later killed by the caliph in 202/817, had imprisoned al-Ma'mūn, and was the one in actual control. This encouraged some members of the 'Alid family to make another bid for power.[313] The rebellion was declared in the name of the pious 'Alid Muḥammad b. Ibrāhīm, known as Ibn Ṭabāṭabā, but its effective leader was Abū al-Sarāyā. The rebellion spread from Kūfa to Basra, Mecca, Medina and Yemen, and reportedly, even the people of Syria were willing to give their allegiance to Ibn Ṭabāṭabā.[314] Abū al-Sarāyā was a former soldier who seems to have turned to banditry when he was not properly paid his salary.[315] It is not clear whether he or Ibn Ṭabāṭabā initiated the rebellion, yet in any case, Ibn Ṭabāṭabā died shortly after the rebellion started. The reason for Ibn Ṭabāṭabā's death is the subject of significant disagreement. When Abū al-Sarāyā defeated Zuhayr b. al-Musayyib, the 'Abbāsid partisan, he reportedly slaughtered most of his soldiers, and captured weaponry, livestock and much money. The amount of loot taken was considerable, and according to Sunnī sources, Ibn Ṭabāṭabā did not give Abū al-Sarāyā a fair share. Upset by the incident, and realizing that Ibn Ṭabāṭabā was in effective control, Abū al-Sarāyā had Ibn Ṭabāṭabā poisoned, and replaced him with someone who Sunnī sources describe as a rebellious or insolent kid (*ghulām 'amrad*), Muḥammad b. Muḥammad b. Zayd.[316] Abū al-Faraj al-'Aṣfahānī (d. 356/966) reports a very different version which reflects the influence of *'aḥkām al-bughā*. According to this version, Abū al-Sarāyā looted the camp of his enemy and divided the spoils of war. Ibn Ṭabāṭabā was already very ill, and when Abū al-Sarāyā came to him after the battle, he found Ibn Ṭabāṭabā very upset. Ibn Ṭabāṭabā condemned Abū al-Sarāyā's behavior and said, "You had no right to fight them without warning them first, and you had no right to take anything from [the enemy] other than their weaponry." Abū al-Sarāyā admitted his error, blamed the fervor of war and promised never to repeat this conduct again.[317] It is quite possible that Ibn Ṭabāṭabā was, in fact, unhappy with Abū al-Sarāyā's conduct, but the language reported in this version is too tailored after the technical style of *'aḥkām al-bughā* to be historical. Significantly, however, the symbolism of 'Alī's conduct, as cast and presented by *'aḥkām al-bughā*, had sufficiently permeated the political polemics.

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[312] See Kennedy, *The Prophet*, 148-152.

[313] Ibn al-'Athīr, *al-Kāmil*, vol. 5, 416; Ibn al-Jawī, *al-Muntaẓam*, vol. 10, 73-74; al-Ṭabarī, *Ta'rīkh*, vol. 8, 590-591.

[314] Al-Iṣfahānī, *Maqātil*, 534. The report about the people of Syria and their willingness to join the rebellion is doubtful. Nonetheless, the rebellion was quite widespread, see Abū Muḥammad 'Abd Allāh b. Muslim b. Qutayba, *al-Ma'ārif*, ed. Tharwat 'Ukāsha (Cairo: Dār al-Ma'ārif, 1981), 387; Ibn Kathīr, *al-Bidāya*, vol. 10, 255; al-Mas'ūdī, *Murūj*, vol. 2, 345-346. It is reported that the rebels in Kūfa minted coins with their own markings. See al-Ṭabarī, *Ta'rīkh*, vol. 8, 591.

[315] Ibn al-'Athīr, *al-Kāmil*, vol. 5, 416; al-Ṭabarī, *Ta'rīkh*, vol. 8, 592; Ibn Qutayba, *al-Ma'ārif*, 387. On the demand for salaries by soldiers and rebellion, see Kennedy, *The Prophet*, 153.

Interestingly, Sunnī sources insist that the 'Alid rebels dealt with the areas they conquered in a shameful fashion, and that this cost them the support of the people and contributed to their defeat. According to these reports, the 'Alid Ibrāhīm b. Mūsā became known as *al-jazzār* (the butcher) because of the number of people that he killed in

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[316] Ibn al-'Imād, *Shadharāt*, vol. 1, 356; Ibn al-Jawzī, *al-Muntaẓam*, vol. 10, 74; Ibn Qutayba, *al-Ma'ārif*, 388; Ibn al-Wardī, *Ta'rīkh*, vol. 1, 202-3. In some reports it is not clear whether Ibn Ṭabāṭabā refused to distribute the loot at all or refused to give Abū al-Sarāyā a share. In either case, the people accepted Ibn Ṭabāṭabā's decision, and this motivated Abū al-Sarāyā to poison him. See al-Ṭabarī, *Ta'rīkh*, vol. 8, 591; Ibn al-'Athīr, *al-Kāmil*, vol. 5, 417. Ibn 'A'tham, *al-Futūḥ*, vol. 4, 448, states that al-Ma'mūn killed Ibn Ṭabāṭabā, but this is most likely a copyist error.

[317] Al-Iṣfahānī, *Maqātil*, 534. This source also claims that Ibn Ṭabāṭabā died of natural causes and that Muḥammad b. Muḥammad was chosen by the 'Alid family, Ibid., 532-533. Al-Ya'qūbī, *Ta'rīkh*, vol. 2, 445, asserts that it was Abū al-Sarāyā who appointed Muḥammad b. Muḥammad.

Yemen. He is also reported to have usurped much property and to have taken women captive. The 'Alid Ḥusayn b. Ḥasan al-'Afṭas reportedly committed rape, usurped property and even set up an area of torture known as the "House of Torture." Zayd b. Musa b. Ja'far became known as *Zayd al-Nār* (Zayd of fire) because of all the 'Abbāsids and their properties he had burned in Baṣra. When the 'Abbāsids defeated Abū al-Sarāyā in Kūfa and Baṣra, and the 'Alids realized that they had lost popular support in Mecca and Medina, they approached Muḥammad b. Ja'far, who was highly respected and who had refrained from engaging in any of the abuses committed, and asked him to become their leader. After considerable pressure, he accepted and received the *bay'a* from the people of Mecca. Reportedly, he was nothing more than a figurehead, and the abuses in the areas under 'Alid control continued, which caused further deterioration in their popular support. In a few months, the 'Alids were defeated by al-Ma'mūn's forces, and Muḥammad b. Ja'far was brought before a large audience in Mecca. He admitted that he was overcome by the temptations of *fitna*, abdicated his claim to the caliphate, and confessed the error of his ways.[318] He was allowed to die in peace; most of the rebels were killed in battle; and Abū al-Sarāyā was killed, mutilated and crucified.[319]

These events must have left a powerful and lasting impact on al-Ma'mūn. His reign had been engulfed in a serious civil war and a widespread 'Alid rebellion. Furthermore, the corporate culture of jurists had developed to the point of posing a serious threat to the caliph's authority as a law maker and executor. The juristic culture had developed a corpus of jurisprudence consisting of principles, opinions and precedent that required a considerable degree of training and competence to master. It appears that al-Ma'mūn had fancied himself a *faqīh* (jurist) or an intellectual of sorts, and would make himself available to debate jurists on Tuesdays of every week. In this context, when asked why he chose to stay in power, he is reported to have answered that he learned that whenever he neglected this role (the role of a caliph), chaos and civil discord spread (*thumma naẓartu fa ra'aytu 'annī matā takhallaytu 'an al-muslimīn ...ghalaba al-haraju wa al-fitna).* He also claimed that he had no desire to rule but simply filled the void until someone else was found whom Muslims could agree upon. If they did, he would promptly abdicate his position.[320] Even if the report was highly exaggerated, it betrays a sense of insecurity and tentativeness about his reign and its legitimacy. But it also conveys a sense of detachment and objective distance that is more fitting for the culture of jurists, not caliphs.[321]

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[318] Al-Ṭabarī, *Ta'rīkh*, vol. 8, 594-596; Ibn Kathīr, *al-Bidāya*, vol. 10, 256-258; Ibn al-Jawzī, *al-Muntaẓam*, vol. 10, 76, 84; Ibn al-'Athīr, *al-Kāmil*, vol. 5, 421-422. Al-Mas'ūdī, *Murūj*, vol. 2, 346, says that Muḥammad b. Ja'far called himself *amīr al-mu'minīn*, and that no one else from the 'Alids had ever adopted this title before or after. (The 'Alids reserved this title only for 'Alī himself.) Al-'Aṣfahānī, *Maqātil*, 534, mentions the legacy of Zayd al-Nār but omits the rest. Earlier, he implies that the alleged abuses are fabrications, see al-Isfahānī, *Maqātil*, 518. However, see al-Ya'qūbī, *Tarīkh*, vol. 2, 449, who records some of Zayd b. Musa's abuses. Ibn al-Wardī, *Ta'rīkh*, vol. 1, 203, asserts that Ibāhīm b. Mūsā was called the butcher because of the number of people he slaughtered or enslaved.

[319] Al-Ṭabarī, *Ta'rīkh*, vol. 8, 594; Ibn Kathīr, *al-Bidāya*, vol. 10, 257; Ibn al-'Athīr, *al-Kāmil*, vol. 5, 421; al-Mas'ūdī, *Murūj*, vol. 2, 347; Ibn al-'Imād, *Shadharāt*, vol. 1, 358. The fact that Muḥammad b. Ja'far died suddenly might mean that he was assassinated, see Ibn al-'Imād, *Shadharāt*, vol. 2, 7; however, see Ibn al-Jawzī, *al-Muntaẓam*, vol. 10, 121, who says that he died because he did too much for one day. See Ibn Qutayba, *al-Ma'ārif*, 389, who implies that Muḥammad b. Ja'far and his family were killed.

In 201/817, in order to remedy this sense of insecurity, al-Ma'mūn took a very daring step; he named the eighth Shī'ī imām, 'Alī b. Mūsā al-Riḍā (d. 203/818), who was a highly honored scholar in his time, as his heir apparent.[322] He also married his daughter to al-Riḍā; ordered soldiers and state officials to wear green, the color of the 'Alids, as opposed to black, the color of the 'Abbāsids; and minted coins in al-Riḍā's name.[323] This was designed to bolster his position vis-a-vis the religious scholars, and strengthen his political legitimacy as well.[324] However, this development alarmed the 'Abbāsid family which reacted by leading a rebellion in Baghdād, and naming Ibrāhīm b. al-Mahdī as the new caliph. By 203/818, al-Riḍā died under mysterious circumstances, and al-Ma'mūn started his year long march to conquer Baghdād and oust the rebel caliph. In 204/819, al-Ma'mūn and his soldiers took off their green clothing and dressed in black again.[325]

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[320] Al-Mas'ūdī, *Murūj*, vol. 2, 341. Jamāl al-Dīn Abū al-Maḥāsin Yūsuf b. Taghrī Birdī al-'Atābakī, *al-Nujūm al-Ẓāhira fī Mulūk Miṣr wa al-Qāhira* (Cairo: al-Mu'assasa al-Miṣriyya al-'Āmma, 1963), vol. 2, 225, says that al-Ma'mūn was educated in religious sciences and mastered Ḥanafī jurisprudence. Ibn al-'Imād, *Shadharāt*, vol. 2, 39, says that the caliph made many contributions to scholarship.

[321] See al-Ya'qūbī, *Ta'rīkh*, vol. 2, 468, where al-Ma'mūn demonstrates his competence over technical points of law, and chides the jurists for their failure to understand or apply technical rules of procedure. Zaman, *Religion and Politics*, 111-112, notes that al-Ma'mūn seemed to claim for himself the type of authority that a Sunnī jurist claims.

[322] Modarressi, *Crisis and Consolidation*, 11; Kennedy, *The Prophet*, 153-154. 'Alī al-Riḍā had reportedly chided his brother Zayd b. Mūsā for his conduct with the people of Baṣra. This pleased al-Ma'mūn and he commented, "This is how the family of the Prophet should behave." See Ibn al-'Imād, *Shadharāt*, vol. 2, 6; Ibn Khallikān, *Wafayāt*, vol. 3, 271.

The series of events that followed led to the *miḥna* (inquisition)--al-Ma'mūn's confrontation with a considerable number of jurists, judges and the transmitters of the Prophet's *sunna*. In 210/825, al-Ma'mūn had Ibrāhīm b. Muḥammad, known as Ibn 'Ā'isha, the great grandson of the man in whose name the 'Abbāsid revolution started, killed and crucified for a suspected plot to overthrow the caliph. This was the first

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[323] Al-Ya'qūbī, *Ta'rīkh*, vol. 2, 448; Ibn al-'Imād, *Shadharāt*, vol. 2, 2; al-Mas'ūdī, *Murūj*, vol. 2, 347; Ibn Khallikān, *Wafayāt*, vol. 3, 270; Ibn al-'Athīr, *al-Kāmil*, vol. 5, 431-432; Ibn al-Jawzī, *al-Muntaẓam*, vol. 10, 93-94.

[324] It is possible, as some have argued, that al-Ma'mūn genuinely held a certain affinity to Shī'ism, and was not simply opportunistic in his policies. See for example, Dominique Sourdel, "La politique religieuse du calife 'abbaside al-Ma'mun," *Revue des etudes islamiques* 30 (1962): 27-48. But even if true, this does not mean that this was the sole motivation for his policies. Al-Ma'mūn had to figure out a way to balance competing political and religious interests, all with their own separate demands and burdens. Among the many considerations was the prevalent reverence given to the family of the Prophet and their descendants. The painful events that surrounded Abū al-Sarāyā's rebellion must have somewhat weakened the popularity of the 'Alid cause; it is not clear how much actual leverage al-Ma'mūn gained from his close association with al-Riḍā. Furthermore, assuming that al-Ma'mūn was genuine in his 'Alid sympathies, contrary to what Sourdel contends, this hardly explains his decision to adopt Mu'tazilī ideas and initiate the inquisition. Recently, some scholars argued that al-Ma'mūn was more of a Jahmite than a Mu'tazilī. See Hinds, "Miḥna," in *Encyclopedia of Islam*, 2nd ed.; Joseph van Ess, "Une Lecture a rebours de l'histoire du mu'tazilisme," *Revue des etudes islamiques* XLVI (1978): 163-240, XIVII (1979): 19-69; idem, "Ibn Kullāb et la Miḥna," *Arabica* XXXVII (1990): 173-233. The Jahmites believed that God was the creator of all acts and believed in predestination. See on this sect, al-Shahrastānī, *al-Milal*, vol. 1, 97-99; al-Baghdādī, *al-Farq*, 158-9. It is likely that al-Ma'mūn came under Jahmite influence while in Khurāsān. This is hardly surprising, however, since al-Ma'mūn was a syncretist, and, at times, eclectic.

[325] It is very likely that al-Riḍā was poisoned to death, but there is disagreement in the sources on whether it was al-Ma'mūn, himself, who ordered al-Riḍā's death or whether it was another member of the 'Abbāsid family. See al-Ya'qūbī, *Ta'rīkh*, vol. 2, 453-454; Ibn al-'Imād, *Shadharāt*, vol. 2, 6, 9; Ibn al-'Athīr, *al-Kāmil*, vol. 5, 448; Ibn Khallikān, *Wafayāt*, vol. 3, 270; al-Mas'ūdī, *Murūj*, vol. 2, 347; Ibn al-Jawzī, *al-Muntaẓam*, vol. 10, 120.

'Abbāsid to be crucified,[326] and it further emphasized al-Ma'mūn's intellectual, and political, distance from the 'Abbāsid elite. A year later, al-Ma'mūn publicly disavowed the caliph Mu'āwiya, and proclaimed 'Alī's superiority to Mu'āwiya.[327] A little over a year later, in 212/827, al-Ma'mūn's intellectual wonderings led him to publicly adopt the Mu'tazilī position of the createdness of the Qur'ān.[328] Al-Ma'mūn did, in fact, have close associations with prominent Mu'tazilī scholars. Both al-Ma'mūn's teacher, Abū al-Hudhayl al-'Allāf (d. 228/842) and his chief judge and close advisor, Aḥmad b. Abī Du'ād (d. 240/854), were Mu'tazilī scholars.[329] However, many of al-Ma'mūn's views did not necessarily correspond to the Mu'tazilī creed. Rather, his views seem to have been synchronistic and to fall somewhere between Shī'ī and Mu'tazilī ideas.[330] Reportedly, al-Ma'mūn had even declared himself a *murji'ī* on occasion.[331]

The doctrine of the createdness of the Qur'ān maintained that the Qur'ān was neither eternal nor co-existent with God. Rather, it was created by God in response to the circumstances and context of the Prophet.[332] There are clear political connotations to this doctrine. If the Qur'ān is circumstantial, then a just ruler may limit its rulings to its specific context. Arguably, the ruler would have the power to override some of the

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[326] Al-Mas'ūdī, *Murūj*, vol. 2, 352-353; al-Ya'qūbī, *Ta'rīkh*, vol. 2, 459; Ibn al-'Athīr, *al-Kāmil*, vol. 5, 475.

[327] Ibn al-'Imād, *Shadharāt*, vol. 2, 25.

[328] Ibn al-'Imād, *Shadharāt*, vol. 2, 27, notes that this proclamation, coupled with the one from the previous year, repulsed people. This, of course, could be after-the-fact Sunnī apologetics.

[329] See Abū Ḥanīfa 'Aḥmad b. Dāwūd al-Dīnawarī, *al-Akhbār al-Ṭiwāl*, ed. Ḥasan al-Zayn (Beirut: Dār al-Fikr, 1988), 396; Kennedy, *The Prophet*, 164; John A. Nawas, "A Reexamination of Three Current Explanations for al-Ma'mun's Introduction of the Miḥna," *International Journal of Middle East Studies* 26, no. 4 (1994): 615-629, 616. Kennedy draws attention to the fact that Mu'tazilī thought had become the creed of the Sāmarrā elite which surrounded the caliph. The 'Abbāsid caliph al-Mu'taṣim later declared Sāmarrā the capital of his empire, Kennedy, *The Prophet*, 163-164.

[330] Ibn al-'Imād, *Shadharāt*, vol. 2, 39, calls him a Mu'tazilī/Shī'ī. Also see Nawas, "A Reexamination," 616-619.

[331] Nawas, "A Reexamination," 617.

[332] Al-Bayhaqī, *Risālat 'Iblīs*, 86-87.

Qur'ān's contextual rulings, and legislate as he saw fit.[333] Nonetheless, it would be dangerous to read too much into this aspect of the Mu'tazilī doctrine. The Mu'tazila also argued in favor of a right to rebellion against an unjust ruler,[334] and this would have been problematic for al-Ma'mūn who insisted on an absolute right to obedience.[335] Furthermore, the doctrine of the createdness of the Qur'ān was widely debated at the time, and was not exclusively held by the Mu'tazila.[336]

The Inquisition and the Clash with Jurists

In 218/833, al-Ma'mūn instituted the *miḥna* under which he proclaimed the createdness of the Qur'ān as the formal doctrine of the state. Al-Ma'mūn ordered that judges, jurists, specialists of *ḥadīth* and public officials be tested, and if they failed to accept the formal doctrine they, depending on the person in question, would be dismissed, banned from teaching or issuing legal opinions, tortured or killed.[337] According to orders reportedly drafted by al-Ma'mūn, he was protecting religion from the ignorant innovators who had corrupted it. This purportedly referred to the proponents of the uncreatedness of the Qur'ān. Yet, the *miḥna* had little to do with the doctrine of the createdness or uncreatedness of the Qur'ān. The *miḥna* was more about the role of institutions than about theological dogma. Al-Ma'mūn attacked those who claimed that they represented the true orthodoxy, and considered themselves the guardians of the truth. The rhetorical attacks were directed at the jurists and their emerging institutions. Al-Ma'mūn contended that these pretenders (the jurists) claimed that whoever opposed them was an impious heretic (*thumma 'aẓharū ... 'annahum ahl al-ḥaqq wa al-dīn wa al-jamā'a wa 'anna man siwāhum ahl al-bāṭil wa al-kufr*).[338] His edicts also contained personal attacks directed at many jurists accusing them of corruption and hypocrisy. Al-Ma'mūn accused many jurists of ignorance, dishonesty and unbecoming conduct.[339] This is hardly surprising because the *miḥna* was an attack on the corporate culture of jurists and, more importantly, on the corpus of jurisprudence that they had constructed, and on which they were uniquely qualified to speak.[340] As discussed above, al-Ma'mūn had come to power after a bloody civil war in which he defeated his brother, and shortly thereafter, he confronted several serious 'Alid rebellions. He continued to experiment with various bases of legitimacy, and at the same time, apparently perceived himself to have the technical competence that jurists possessed over the accumulating corpus, not just of *ḥadīth*, but of principles, rulings and precedents. The inquisition was al-Ma'mūn's attempt to assert his own theological and legal authority over the assertive, and at times aggressive, juridical culture.

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[333] Kennedy, *The Prophet*, 163; also see Ira M. Lapidus, "The Separation of State and Religion in the Development of Early Islamic Societies," *International Journal of Middle East Studies* 6 (1975): 363-385.

[334] See al-Bayhaqī, *Risālat 'Iblīs*, 97, where he also accuses the non-Mu'tazila of inventing traditions demanding blind obedience to the ruler.

[335] Nawas, "A Reexamination," 621.

[336] Ibid., 617.

[337] Ibn al-'Athīr, *al-Kāmil*, vol. 6, 3-6; al-Ṭabarī, *Ta'rīkh*, vol. 8, 643-647; al-'Atābakī, *al-Nujūm*, vol. 2, 221; Ibn Kathīr, *al-Bidāya*, vol. 10, 284-286; Ibn al-Jawzī, *al-Muntaẓam*, vol. 11, 15, 20.

One of the most famous victims of the inquisition was 'Aḥmad b. Ḥanbal (d. 241/855) who, as discussed later, with the collaboration of *ahl al-ḥadīth*, insisted on an absolute prohibition against armed rebellion. Unlike the Mu'tazila, Ibn Ḥanbal argued that obedience is due to a ruler, just or unjust, unless one is ordered to commit a grave sin. Even then, one ought to passively accept torture or death but not rebel.[341] But this was hardly sufficient for al-Ma'mūn. He did not merely want passive obedience by the jurists; he wanted inclusion. It is doubtful that al-Ma'mūn desired either to subjugate or replace the culture of jurists. As noted earlier, al-Ma'mūn was fond of demonstrating his juristic prowess. Furthermore, even after the commencement of the inquisition, al-Ma'mūn continued to surround himself with Mu'tazilī jurists. Rather, al-Ma'mūn wanted to be recognized as a legal authority by the juristic culture, and to share the interpretive and legislative legitimacy of the jurists. Jurists may recognize regulations and administrative edicts issued by rulers as law, but not necessarily as jurisprudence. The regulations and edicts of *siyāsa* (political organs) do not carry precedential value unless sanctioned, authenticated and incorporated by the jurists.

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[338] Al-Ṭabarī, *Ta'rīkh*, vol. 8, 642; al-'Atābakī, *al-Nujūm*, vol. 2, 219; Ibn al-Jawzī, *al-Muntaẓam*, vol. 11, 17.

[339] Al-Ṭabarī, *Ta'rīkh*, vol. 8, 647; Ibn al-Jawzī, *al-Muntaẓam*, vol. 11, 23; Ibn al-'Athīr, *al-Kāmil*, vol. 6, 5; al-'Atābakī, *al-Nujūm*, vol. 2, 221. Reportedly, al-Ma'mūn tells one of the jurists, "Aren't you the one who told *'amīr al-mu'minīn* (i.e. al-Ma'mūn) [in the past], you (i.e. the caliph) [have the power to] make things legal or illegal (*'alasta al-qā'il li 'amīri al-mu'minīn 'innaka tuḥallil wa tuḥarrim*)?" It is not clear from the context what is the intended meaning of the statement. Possibly al-Ma'mūn is using this as evidence that the jurist is a hypocrite because he conceded a power to the caliph that the caliph should not have. More likely, al-Ma'mūn was confronting the jurist with his past admission that the caliph should, in fact, have this power. Since the caliph had now decreed the doctrine of the uncreatedness of the Qur'ān to be illegal, there was no reason that this jurist should not obey.

[340] See Nawas, "A Reexamination," 619-624; Zaman, *Religion and Politics*, 106-118; Crone and Hinds, *God's Caliph*, 93-96; Lapidus, "The Separation of State and Religion," 363-85.

Al-Ma'mūn did not live long enough to see the results of the inquisition; he died a few months after it was instituted. But ultimately, it was a complete failure because it was unable to negotiate with or reformulate the nature of the dynamics with the juridical culture.[342] At the time al-Ma'mūn put the *miḥna* into effect, the vast majority of jurists acquiesced and gave the caliph the admission he wanted. Only a few die-hard traditionists or jurists, such as Aḥmad b. Ḥanbal, refused to compromise and suffered the consequences.[343] Reportedly, the jurists who compromised relied on the interpretation of the Qur'ānic verse: "Anyone who after accepting faith utters [words of] unbelief, except under compulsion,...on them will be God's anger and they will receive a dreadful penalty."[344] Therefore, since they were acting under duress, the jurists reasoned that they could give al-Ma'mūn the confession he sought without being liable in the Hereafter.[345] Although this was hardly an example of complex legal analysis, the legal culture of the jurists was sufficiently formed to permit them to rely on the technicalities and loopholes of law in order to respond to a non-legal issue. Al-Ma'mūn confronted the jurists with a theological, perhaps moral, problem, and they responded with a legal solution. Al-Ma'mūn, if he had lived longer, would not have joined the ranks of jurists because he was primarily a politician, and while the cultures of law and politics often cooperate, they frequently clash, limiting and restraining each other.

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[341] Ibn Ḥanbal was tortured and imprisoned for his refusal to admit that the Qur'ān was created. There are no reports that he ever got involved in or sympathized with an armed rebellion. See Gibb and Kramers, *Shorter Encyclopedia of Islam*, 20-21.

[342] The inquisition was officially stopped in 234/857 during the reign of al-Mutawakkil (r. 232/847 - 247/861). In fact, the doctrine of creation of the Qur'ān was banned. See Gibb and Kramers, *Shorter Encyclopedia of Islam*, 377-378.

[343] Ibn al-'Imād, *Shadharāt*, vol. 2, 39; al-'Atābakī, *al-Nujūm*, vol. 2, 224; al-Ṭabarī, *Ta'rīkh*, vol. 8, 648; Ibn al-'Athīr, *al-Kāmil*, vol. 6, 5; Ibn al-Jawzī, *al-Muntaẓam*, vol. 11, 24; Ibn Kathīr, *al-Bidāya*, vol. 10, 286; al-Ya'qūbī, *Ta'rīkh*, vol. 2, 468. Ibn 'A'tham, *al-Futūḥ*, vol. 4, 454-5, and Ibn al-Wardī, *Ta'rīkh*, vol. 1, 211-2, claim that after torture all the jurists except Ibn Ḥanbal and another jurist acquiesced. Ibn Ḥanbal was also tortured by the 'Abbāsid caliph al-Mu'taṣim (r. 218-833 - 227/842).

As Crone and Hinds argue, a confrontation between the caliphal authority and the jurists was long in the making before al-Ma'mūn. As the culture of the jurists increasingly claimed the right to interpret the Divine Will, the juristic and moral authority of the caliphs became increasingly constrained. Significantly, Crone and Hinds contend that the jurist al-Shāfi'ī played a major role in the development of this confrontation, as he sought to take religious authority from the caliphs and place it in the community at large, and in the *sunna* of the Prophet. The scholarly concept of the Prophetic *sunna* threatened to displace caliphal authority, as it, and not the caliph, became the arbiter of law and authority. In the colorful language of the authors, "If al-Ma'mūn had not sensed where things were going, al-Shāfi'ī spelt this out for him in no uncertain terms: the caliph was a mere executor of the law chosen by the community. But al-Shāfi'ī's views were simply nails in the caliphal coffin."[346] While conceding that the introduction of the *miḥna* had more to do with problems of legitimacy than with al-Shāfiʿī's thoughts, the authors argue that the confrontation between the sacred law and caliphal authority had come to a high point.[347] The jurists and the caliphs were rival representatives of God's law, and ultimately, the jurists won. The jurists became the representatives of the Divine law and the caliphs its mere executors.[348]

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[344] Qur'ān 16:106.

[345] Al-Ṭabarī, *Ta'rīkh*, vol. 8, 648-649; Ibn al-'Athīr, *al-Kāmil*, vol. 6, 5-6; Ibn Kathīr, *al-Bidāya*, vol. 10, 286. These sources are careful to point out that the jurists were wrong in their interpretation, and that the cited verse does not excuse the dissimulation in this situation. But see Ibn al-Wardī, *Ta'rīkh*, vol. 1, 211.

[346] Crone and Hinds, *God's Caliph*, 93.

Some scholars such as Muḥammad Zaman take issue with this analysis and, basically, argue that other than the interregnum of the *miḥna*, there had been no conflict between the jurists and caliphs. Citing many examples of patronage between the early ʿAbbāsids and the jurists, the author argues that collaboration, and not confrontation, was the earmark of the relationship between the jurists and the caliphs.[349] According to Zaman, there was never a divorce between religion and politics, and the early ʿAbbāsid caliphs never lost their authority over religious or legal matters.[350] In fact, they continued to adjudicate cases and cooperate with the jurists to enforce orthodoxy.[351] Importantly, the ʿAbbāsid caliphs came to rely on the jurists to enhance their own legitimacy, and enforced an extensive system of patronage which rewarded the jurists for their cooperation.[352] Significantly, the author argues that the legitimacy of the ʿAbbāsids, when they first came to power was, in fact, problematic. The author asserts that by that time political quietism had not yet become established doctrine, and, therefore, in the mid-second century, many jurists did join the rebellion of al-Nafs al-Zakiyya. Nonetheless, the ʿAbbāsids pursued a policy of severe retribution against jurists who dared join a rebellion, and concurrently, they generously rewarded jurists who cooperated with the regime. The result, Zaman argues, was prevalent quietism among, what he calls, proto-Sunnī jurists. Zaman concedes that there were moments of mutual distrust and conflict but ultimately, quietism became the established doctrine among proto-Sunnī jurists.[353] His analysis stumbles a bit when it comes to the *miḥna*, but he basically argues that it is cooperation and collaboration between the jurists and the caliphs that prevailed after the *miḥna*.

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[347] Ibid.

[348] Ibid., 110.

[349] Zaman, *Religion and Politics*, 118.

[350] Ibid., 70.

[351] Ibid., 106, 118.

[352] Ibid., 156-157, 167-169, 185.

To the extent that Crone and Hinds overstate their case, I believe that Zaman is justified in his criticisms. Zaman produces a convincing body of evidence proving the existence of a system of patronage and collaboration between the jurists and the early 'Abbāsids. He is also correct in concluding that the argument of some, such as T. Nagel, that the *ahl al-Sunna* continued to view the 'Abbāsids with passionate hostility well into the late second and early third century, is implausible.[354] Nonetheless, while Crone and Hinds' claims about a division between religion and politics are perhaps exaggerated, Zaman ignores the particularity of legal culture and its logic. Once a legal culture develops and a cumulative corpus of legal doctrines and precedent is formed, the tendency is to uphold the integrity and independence of that corpus. This is why, for example, while caliphs continued to adjudicate cases after the *miḥna*, the books of jurisprudence do not, for the most part, incorporate or cite the decisions of these caliphs. In the eyes of Sunnī jurists, rulers rarely reach the point of sufficient competence in the technicalities of law, such that the adjudications of these rulers become part of the official corpus of legal culture. It is not a coincidence that other than the four rightly-guided caliphs and the 'Umayyad caliph 'Umar b. 'Abd al-'Azīz, one will rarely find the caliphs cited in legal hornbooks or in the *fatāwā* literature. Whenever a caliph is cited, he is invariably cast in the role of the inquirer, and a jurist is cast in the role of the responder. We already saw several examples of this in the context of the verses on *baghy* and *ḥirāba*. This, of course, does not mean that a ruler, in his lifetime, is denied the right to adjudicate cases or resolve disputes. But he does so as an outsider to the legal field.[355] Very much like any other developed technical field, specialists such as jurists, cite and rely on specialists. This does not mean that they are not influenced by the demands of politics or society; far from it. Rather, the perceived political and social demands are channeled through the structures and linguistic practice of the legal culture, and are often reconstructed, or at times, deformed and mutilated in the process. It is through the particularities, details and technicalities of the legal practice that jurists often express cooperation or resistence to political or social demands.

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[353] Ibid., 70-106.

[354] Ibid., 192.

More importantly for our purposes, Zaman's arguments about juridical quietism are unpersuasive. I argued earlier that assertions about juristic quietism are hopelessly ambiguous and quite meaningless. As asserted earlier, once a legal culture develops to a point of becoming institutionalized, the natural inclination of juridical culture is towards stability, law and order. It is the willingness to engage in an armed rebellion that needs to be explained, and not the desire for order and stability. It is extremely difficult to discharge the necessary functions of law or resolve disputes in an orderly fashion if chaos and anarchy are prevalent. Early Muslim jurists, as demonstrated above, did engage in several rebellions as the corporate culture of jurists was developing. Quietism, however, did not prevail after the mid-second century, as Zaman argues. Rather, the terms of the discourse changed to reflect the emerging sophistication of the legal culture. In the tradition of the best jurists, the topic of rebellion became replete with legal distinctions and technical particulars.

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[355] Crone and Hinds, *God's Caliph*, 109, states: "But rulers were obeyed as outsiders to the community, not as representatives of it, except (in Islam) in their performance of ritual duties such as leadership of the prayer or conduct of *jihād*, the latter being an activity particularly apt to restore moral continuity between the ruler and his subjects. The state was thus something which sat on top of society, not something which was rooted in it; and given that there was minimal interaction between the two, there was also minimal political development: dynasties came and went, but it was only the dynasties that changed." This is true to the extent that jurists indulge in the delusion that they represent the community. Whether or not rulers were allowed to be rooted in the community is not the appropriate question. I would argue that rulers were not allowed to be rooted in the legal culture of the jurists.

Quietism, Activism and Legal Technicalities

The technicalities and linguistic practice of the juridical discourse will occupy us in the following chapters. Before doing so, it is important to elaborate upon the idea of quietism and the transition to a technical discourse. In order to demonstrate the point, I will focus primarily on a couple of examples. We already discussed the example of Aḥmad b. Ḥanbal who rejected any right to rebellion, but who steadfastly refused to obey the caliph's orders on the creation of the Qur'ān. It is debatable whether his position can be described as quietist.[356] For example, are those who refuse to obey what they believe to be an illegal order, and consequently are arrested and tortured, quietist or activist?

But beyond Ibn Ḥanbal's example, consider the case of Sufyān al-Thawrī (d. 161/778), who is reportedly "known for his strict quietism."[357] Al-Thawrī refused to join the rebellion of al-Nafs al-Zakiyya and is not reported to have joined any other rebellion. Yet, historical reports have transformed him into a juristic folk hero of sorts.[358] Al-Thawrī, like many other jurists, saw himself as a doctor whose job is to nurse people to good health. Reports often caste him in the role of the living conscience of society, and the mouth piece of the truth.[359] Al-Thawrī steadfastly refused to accept a judicial position and seems to have made the criticism of caliphs, such as al-Manṣūr and al-Mahdī, a regular habit.[360] For example, he continued to malign the caliph, al-Manṣūr, until the caliph vowed to have him killed, and in fact, sent an agent to Mecca to have him crucified. Al-Thawrī's response was not only to go into hiding but to also swear to disavow the Ka'ba if al-Manṣūr ever entered Mecca. Fortunately for al-Thawrī, al-Manṣūr died shortly thereafter.[361] An oath to disavow the Ka'ba for political reasons is a rather powerful moral and legal precedent.

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[356] Al-'Atābakī, *al-Nujūm*, vol. 2, 221, for example, claims that if it had not been for Ibn Ḥanbal's principled stand, many people would have been led astray. One can only guess whether he would have left a larger impact if he had risen in an armed rebellion. Also see Ibn Kathīr, *al-Bidāya*, vol. 10, 351.

[357] Zaman, *Religion and Politics*, 185.

[358] Al-Dhahabī, *Siyar*, vol. 7, 241, says he was slightly influenced by Shī'ī ideas (*wa fīhi tashayyu' yasīr*). On Sufyān al-Thawrī and his reported Shī'ī sympathies see, al-Iṣfahānī, *Maqātil*, 415-416. Al-Thawrī reportedly sympathized with 'Īsā b. Zayd who advocated rebellion against al-Mahdī.

[359] Al-Dhahabī, *Siyar*, vol. 7, 243.

When al-Mahdī took power, he asked al-Thawrī to accept a judicial position, and informed him that he was free to judge according to the Qur'ān and *Sunna*. Al-Thawrī again, refused. When friends asked al-Thawrī why he refused to accept the position when the caliph had given him license to apply the Qur'ān and *Sunna*, he is reported to have scoffed at the pettiness of their intellect, or their naiveté, and escaped to Baṣra,[362] where he continued to attack and malign al-Mahdī.[363] In another report, al-Thawrī entered upon al-Mahdī, and addressed him rudely. The caliph's agent chided al-Thawrī: "You address *amīr al-mu'minīn* (the commander of the faithful) in this fashion, and you are a [lowly] man from Thawr." Al-Thawrī responded: "A man from Thawr who obeys God is better than a man from your folk who disobeys God."[364] Al-Thawrī is also reported to have mediated in a marital dispute between al-Mahdī and his wife. Al-Mahdī, over his wife's objections, wanted to take a second wife. Al-Thawrī's mediation was requested, and he ruled in favor of al-Mahdī's wife. He argued that since al-Mahdī was not an equitable person, al-Mahdī will not treat his wives justly, and, therefore, he could not take a second wife.[365] Obviously, there is a not so subtle condemnation of al-Mahdī's character in this report. In yet another widely cited report, al-Thawrī was brought before al-Mahdī. Al-Thawrī refused to greet al-Mahdī as caliphs are greeted and instead, greeted him as a commoner. Al-Mahdī smiled indulgently, and said: "You keep hiding from us here and there, and you think that if we wished to harm you we could not. Here, we have caught you now, don't you fear that we will do with you as we please?" Al-Thawrī responded:" You may do with me as you wish, and a powerful Lord (i.e. God), who distinguishes between truth and falsehood, will judge you [as He wishes]." The caliph's agent offered to have al-Thawrī killed saying: "Oh, commander of the faithful, can this ignorant person address you in this [insolent] fashion! Let me strike his head." Al-Mahdī responded: "Be silent, [may God] confound you! Do people like him want anything other than that we would kill them so that their happiness becomes our misery? No, assign him to the judgeship of Kūfa, and let no one overturn his judgments." Al-Thawrī took the caliph's letter of appointment, discarded it in the Tigris river, and went into hiding until he died.[366]

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[360] Al-Dhahabī, *Siyar*, vol. 7, 242, asserts that he would criticize rulers (*al-mulūk*) but rejected rebellion.

[361] Ibn al-'Imād, *Shadharāt*, vol. 1, 250; al-Dhahabī, *Siyar*, vol. 7, 251.

[362] Al-Dhahabī, *Siyar*, vol. 7, 262.

[363] See, for example, al-Dhahabī, *Siyar*, vol. 7, 244, 264.

[364] Ibn Khallikān, *Wafayāt*, vol. 2, 388.

Clearly, these reports have the earmarks of folk tales; they are constructed exaggerations but with a kernel of truth. Something about al-Thawrī's legacy captured the popular, or perhaps even the juristic, imagination which then re-asserted his legacy into symbols of valor and uprightness. Nothing, not even the Ka'ba or the hope of applying the Qur'ān and *Sunna*, would tempt him to compromise. These could be transformed into powerful and even dangerous legal precedents. From the point of view of juristic culture, can one say that he was a strict quietist or that his legacy was one of strict quietism? The answer is yes, but only if one is willing to claim that the only form of possible juristic activism is armed rebellion. Jurists could adopt a militant stance, join armed rebellions, get killed and leave the rest to the popular imagination. Alternatively, they could express dissent and, at times, subversion through the medium of their own legal culture. Take al-Shāfi'ī for example. As discussed above, he was involved in a rebellion, but then settled in Egypt and proceeded to develop a discourse on rebellion that was expressed through the technical categorizations and distinctions of law. In a fashion, this is quietist. But from a different perspective, he set a discourse in motion that continued to play a dynamic and tension-filled role well into the modern age. Ibn Taymiyya, as we saw, even accuses him and those who preceded him or followed in his footsteps, of suborning rebellion and spreading *fitna*. One can argue that juristic discourse and culture are an anomaly, and are largely irrelevant to what or how people go about their lives. This could very well be true. But it is the juristic discourse which is often blamed for becoming quietist. To be consistent, one would have to argue that whether jurists are quietist or not is largely irrelevant to the anthropology of society. One cannot focus on juristic culture to prove a point about quietism, but then ignore the relevance of the technicalities and idiosyncrasies of that legal culture.

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[365] Ibid., 389.

[366] Al-Mas'ūdī, *Murūj*, vol. 2, 255; Ibn al-'Imād, *Shadharāt*, vol. 1, 250-251; Ibn Khallikān, *Wafayāt*, vol. 2, 390-391.

There is no doubt that early Islamic juristic culture produced many traditions counseling against *fitna* and advocating law and order. Even Ja'far al-Ṣādiq, the sixth Shī'ī *'imām*, rejected the use of force and armed rebellion against those in power.[367] This is hardly surprising considering the scale of rebellions and civil violence in early Islam, and considering the juristic predisposition towards order and stability. The more the corporate identity of the jurists and their culture developed, the more they became vested, not necessarily in the political regime in power, but in the cultural institutions of society, and in the corollary need for stability. Nonetheless, as we have seen, some of the most notable individuals in Islamic history have either supported or sympathized with rebellions. This included companions of the Prophet, and later jurists. For better or worse, their actions became legal precedents that needed to be incorporated, followed or distinguished, and even perhaps, discarded. But considering the extent of the rebellions or the opposition to government in which jurists were frequently involved, to paraphrase Crone and Hinds, the rules of law as articulated by jurists, "were frequently and indeed intentionally unhelpful to the state."[368] It is exactly this point which explains the rise of *'aḥkām al-bughā* in Islam, and to that, we turn next.

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[367] Modarressi, *Crisis and Consolidation*, 8-9.

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[368] Crone and Hinds, *God's Caliph*, 91. The authors maintain that it was the rules of the *Sunna* that were unhelpful to the state. I do not share the authors' views on the *Sunna*. The *Sunna* was a raw body of uninterpreted and undeveloped precedents. It is the legal interpretation of the *Sunna*, and not the *Sunna* itself, which was unhelpful to the state.

CHAPTER 3

THE RISE OF THE JURISTIC DISCOURSE ON REBELLION

Fragmentation, Terror and the Juridical Response

In the first two centuries of Islam, the jurists witnessed numerous occasions where Muslims fought each other. While it would be inaccurate to assert that the 'Umayyads or the early 'Abbāsids were considered illegitimate,[369] there were several rebellions that attracted the sympathy or participation of some of the most notable jurists. Nonetheless, the issue of rebellion could not be approached dogmatically. It was not a simple matter of declaring one party good and the other evil. Jurists had to live and work within the emerging institutions of society. Furthermore, rebellions, which often elicited cruel and swift vengeance by the caliphs, served as reminders of the evil of *fitan*, and also served as reminders of the ability of the rulers to apply raw power and force when they deemed it necessary. This was taking place at a time when the corporate and institutional identity of the jurists was developing. Of course, the caliphs claimed the power of the sword and God to their side. But jurists wished to claim the power of legality to their own side. They, in other words, would become the authoritative bearers of lawfulness -- the lawful invocation of the sword and God.

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[369] No question that this matter differed from place to place. The Kūfans, for instance, did not recognize the legitimacy of the 'Umayyads while the rank and file Syrians perhaps did. Ḥijāz (Mecca and Medina), to a large extent, remained anti-'Umayyad. The vast anecdotal ani-'Umayyad literature demonstrates the ambiguity surrounding the legitimacy of the 'Umayyads. In fact, the large number of *ḥadīth* about the obligatory nature of obedience to unjust rulers seems to indicate that these rulers were often looked at as illegitimate, but, nevertheless, had to be obeyed.

The *miḥna* was symptomatic of this process. In a sense, whether the jurists won the battle of the inquisition or not depends on how one looks at the matter. In the short run, the vast majority gave in to the caliph's demands and admitted whatever the caliph wanted. But they did not do so by yielding their power to define lawfulness or concede the terms of the discourse to the caliph. They did so by declaring the accommodation of the caliph to be a temporary exception brought about by unlawful compulsion.[370] This was a wonderfully technical way to obey and disobey the caliph all at once. This was also precisely why rulers perceived the legal discourses on duress with much suspicion, which at times, resulted in repression.[371] Al-Ma'mūn, of course, by instituting the inquisition entirely missed the point. If the inquisition was instituted to humble and subdue the juristic culture, in the long term, it did not produce many concrete results. The juristic culture was too developed by this time to be substantially affected by politically motivated theological dogma. The jurists had developed their own methodology for discovering the Divine Will, and hence, the jurists continued to be the enunciators, on God's behalf, of lawfulness.

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[370] For instance, it would make little sense to argue that Sunnī Muslims have ultimately won the battle against Shī'ī Muslims because Shī'ī Muslims had to adopt, at times, the practice of dissimulation (*taqiyya*). For a study on the extensiveness of dissimulation see, Devin J. Stewart, "*Taqiyyah* as Performance: The Travels of Bahā' al-Dīn al-'Amilī in the Ottoman Empire (991-93/1583-85)," *Princeton Papers: Interdisciplinary Journal of Middle Eastern Studies* 4 (1996): 1-70.

[371] We have already alluded to the example of Mālik b. 'Anas and what reportedly befell him because of his opinion regarding divorce obtained under duress. The Ḥanafī school of law, which seems to have been more pragmatic in its approach and perhaps, therefore, more accommodating of the state, adopted the view that the divorce or manumissions of the duressed are legally effective anyway. See al-Azmeh, *Muslim Kingship*, 188, who argues that the Ḥanafī legal tradition is oriented towards the idea of a strong state while the Shāfi'ī legal tradition is more pietistic and bookish. Also see Hinds, "Miḥna," in *Encyclopedia of Islam*, 2nd ed. for the relationship between the Miḥna and Hanafism. The clear political connotations of the Ḥanafī discourses on duress are well-illustrated in an entry in Shams al-Dīn al-Sarakhsī (d. 483/1090-91), *al-Mabsūṭ* which notes that many rulers compel people to divorce or free slaves, and this should be tolerated because God tests people with worse calamities than this. However, the entry also notes that this is one of the areas of the law that can change with time and place. Despite the Ḥanafī's indulgence of the rulers' whims on this point, this did not necessarily free them from suspicion or repression. For instance, when the same jurist, Shams al-Dīn al-Sarakhsī, composed his book on duress, the caliph ordered that al-Sarakhsī be brought in for questioning, and attempted to seize the book. Fortunately, one of al-Sarakhsī's students hid the book in a well, and it survived. See al-Sarakhsī, *al-Mabsūṭ*, vol. 24, 39-40. Nevertheless, al-Sarakhsī was thrown in prison for ten years because of a *fatwā* he issued on an unrelated matter. See, on his life, Heffening, "al-Sarakhsī," in *Encyclopedia of Islam*, 1st ed., p. 159-60. The Shāfi'ī jurist Ibn Kathīr was also persecuted because of his views on divorce pronounced under duress, see Ibn al-'Imād, *Shadharāt*, vol. 6, 232. On the topic of duress in Islamic law, see Abou El Fadl, "The Common and Islamic Law of Duress," 121-159, esp. p. 150.

This should not be seen as a dogmatic one-sided relationship; the jurists did not become God's representatives on earth, and that was the end of the story. Rather, it should be perceived as a reciprocal and dialectical process of accommodation and resistance. Muslim jurists accommodated and resisted rulers to varying extents, and according to a variety of circumstances.[372]

Nevertheless, I do not wish to over-emphasize the point about juristic responsiveness. Jurists do not function under either a strict paradigm of realism or idealism, and forego all else. As argued earlier, there is also the specific imperative of juristic culture which imposes its own suppositions and logic, and functions within the mandate of its own authoritative sources and processes. This means that juristic culture is often unresponsive to changing political and social needs or, more often, responsive according to its own terms and language.[373] The earliest juristic discourses on rebellion were formulated mostly as a response to pre-*miḥna* circumstances. After the middle-ʻAbbāsid period, the racial, political and religious demographics of the Islamic Empire changed with considerable speed. As we discuss later, the fact that the juridical discourses appeared to lag behind, or at times appeared entirely unrelated to any contemporaneous reality, invoked some jurists to complain that the law in this field needed to be altered to better suit the age. Some jurists omitted altogether, the chapter on the law of rebellion from their legal hornbooks. Nonetheless, the predominant majority of jurists continued to discourse on the law of rebellion within the constructs set up by the legal culture.

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[372] This, for example, is well-illustrated in the case of tax farming as a method of collecting state revenue. Muslim jurists, particularly from the Ḥanafī school, accommodated certain forms of tax farming, but uncompromisingly objected to others. See Abou El Fadl, "Tax Farming," 5-32.

[373] Alan Watson ably demonstrates that jurists, to a large extent, speak to other jurists. Consequently, juristic discourse is often unresponsive to social needs or demands. Rather, jurists often respond to the logic of other jurists, and to the constructs of their specific culture. See Alan Watson, "Legal Change: Sources of Law and Legal Culture," *University of Pennsylvania Law Review* 131 (1983): 1121-1157; Idem, *Failures of the Legal Imagination* (Philadelphia: University of Pennsylvania Press, 1988), esp. 133-154. No doubt, because of the constraints of the juristic culture, failures of the legal imagination do occur quite frequently. Two points need to be emphasized – points which I suspect that Watson would not necessarily disagree with. One, the juristic culture does not always fail to respond to social needs. Often, it does. Two, when the juristic culture does respond, it often does so in a manner that is consistent with its own terms of discourse. What from the perspective of the culture of jurists could be considered a revolutionary change in the law, from a social perspective could be considered pedantic. A jurist, for example, may argue that a statute of limitations does not start running unless the plaintiff has knowledge of a claim of right, or a jurist may argue that a person has constructive knowledge if a reasonable person would have known of a claim of right. Alternatively, a jurist may specify the harshest penalties for the crime of banditry, but require that the act of banditry be observed by two witnesses who are not victims to the alleged crime, and therefore, make it nearly impossible to prove the crime. In response to the spread of banditry, a jurist may then argue that if there are no other witnesses to the crime, the testimony of the victims will be accepted, however, in this situation, a death sentence is not allowed. In all of these examples, a jurist might be responding to a social or political need, but the response is articulated within the confines of a certain legal culture. Whether any of these technical responses are effective very much depends on the specific situation.

As stated above, the *miḥna* was symptomatic of a dynamic already taking place between the jurists and the state. The *miḥna*, itself, did not produce major revisions in the Islamic discourses on rebellion. Nevertheless, the period that followed the *miḥna* produced complicated factors that challenged, and at times, altered the way Muslim jurists addressed the topic of rebellion. Some of the main rebellions were led by extremist theological factions and often resulted in territorial secessions for long periods of time.[374] Ethnicity and extreme religious doctrines mixed together, and from the point of view of the jurists, it was difficult to distinguish one from the other. Muslim jurists often applied the generic term *bāṭiniyya* to many of these movements.[375] For example, during the reign of al-Mu'taṣim (r. 218/833 - 227/842), there was a serious rebellion by Māzyār b. Qārin in Ṭabaristān which was primarily a revolt against the influence of the Tahirids who provided the main source of military support to the caliph. Māzyār was defeated by the caliph in 224/838-9, and the rebel was flogged to death and crucified.[376] One of al-Mu'taṣim's commanders, called 'Afshīn, was accused of conspiring with Māzyār, and after a trial, he was imprisoned, starved to death, crucified and burned.[377] Importantly, 'Afshīn's trial focused on the accusation that he was pretending to be Muslim, and that he never sincerely abandoned his ancestral beliefs.[378] Importantly, Māzyār and 'Afshīn are cited by some Sunnī sources as examples of individuals who belonged to the *bāṭiniyya* sect.[379]

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[374] Modarressi, *Crisis and Consolidation*, 19-51 demonstrates the rise of extremist theological (*ghulāt*) positions from the time of the death of the Prophet, especially from the beginning of the 2nd/8th century and onwards. The rapid spread of extremist theological views took place in the 3rd/9th century. On the *ghulāt* and their doctrines, see al-Shahrastānī, *al-Milal wa al-Niḥal*, vol. 1, 203-222.

[375] See, on the *bāṭiniyya*, the article in Gibb and Kramers, *Shorter Encyclopedia of Islam*, 60-61. Also see al-Shahrastānī, *al-Milal wa al-Niḥal*, vol. 2, 228-235. The editors to this work note that the terms *bāṭiniyyā* and *ghulāt* are often mixed. Ibid., 228.

[376] Al-Ṭabarī, *Ta'rīkh*, vol. 9, 51. One of Māzyār's supporters, al-Durrī, had his limbs amputated and was then killed. Ibid., 52. The rebels were not humanistic in their approach either. They committed widespread slaughter and pillaging. See, especially, an incident where they grabbed a young man taken hostage while praying, and lynched him. Ibid., 43.

Al-Mutawakkil (r. 232/847 - 247/861), in an attempt to appease the traditionists, reversed the pro-Mu'tazilī policies of his predecessors. In 237/851-2, he persecuted suspected 'Alid sympathizers, destroyed the tombs of the descendants of 'Alī and ordered that 'Alī be cursed from the pulpits of mosques.[380] After the death of al-Mutawakkil, a period of anarchy followed in Sāmarrā, the declared capital of the 'Abbāsids at the time, which lasted from 247/861 to 256/870, and which saw the rise and fall of four caliphs.[381] Several rebellions of a somewhat indefinite character followed.[382] For example, a man of Arab origins born in Iran known as 'Alī b. Muḥammad tried his hand at being a poet in Sāmarrā, and then a prophet in Baṣra. Having failed at both, he declared that he belonged to the 'Alid family, although his exact lineage is not clear. Interestingly, he focused on attracting slaves, and in 255/869 started what is known as the Zanj rebellion which lasted for about ten years. The policies adopted by the Zanj rebellion were very cruel, and relied on guerrilla warfare tactics, and the execution of all captives. In 257/871 he sacked Baṣra, pillaged its buildings, massacred many of its inhabitants and burned its mosques. Before he was defeated and killed in 270/883, he had declared a capital in Mukhtāra, took the title of al-Mahdī and minted coins.[383]

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[377] Al-Ṭabarī, *Ta'rīkh*, vol. 9, 58.

[378] Al-Ṭabarī, *Ta'rīkh*, vol. 9, 55-66; Ibn al-'Athīr, *al-Kāmil*, vol. 6, 62-64; some of the accusations against 'Afshīn was that he owned heretical books, and that he said Arabs are like dogs.

[379] For example, al-Baghdādī, *al-Farq bayn al-Firaq*, 214-215; this source also says that the *bāṭiniyya* movement appeared in the reign of al-Ma'mūn and spread during the reign of al-Mu'taṣim.

[380] Ibn al-'Athīr, *al-Kāmil*, vol. 6, 108-109; Kennedy, *The Prophet*, 169.

[381] Kennedy, *The Prophet*, 171.

[382] By indefinite, I mean that the rebellions described below were synthetic in nature. They seem to have combined ideas of ethnic or racial equality or superiority with gnostic and esoteric notions from Mazdeism or Manichaeism with fragments from Hellenistic philosophy.

The rebellion of the Zanj had hardly been defeated when a far more serious, and equally indefinite, rebellion commenced by a federation of Arabs and Nabateans known as the Qarāmiṭa in 278/891.[384] Again, the Qarāmiṭa are described as *bāṭiniyya*, *zanādiqa* and Ismā'īlī.[385] The likelihood is that the Qarāmiṭa followed in the footsteps of the Zanj, and at one time even thought of allying themselves to the Zanj.[386] The ideas of their founder were synchronistic, esoteric, and quite heretical.[387] Like the Zanj, the Qarāmiṭa applied extremely cruel guerrilla warfare tactics, and slaughtered mercilessly and indiscriminately. Sunnī sources report wide-scale raping and pillaging by the Qarāmiṭa and, as mentioned earlier, in 317/930 they massacred pilgrims on their way to Mecca, sacked Mecca itself, and removed the Black Stone from the Ka'ba.[388] They continued to be a serious threat until the late 4th/10th century.[389]

The earmark of these rebellions in the 3rd/9th-early 4th/10th centuries was the widespread use of terror tactics. Although terror tactics were used by the Khawārij as well,

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[383] Al-Ṭabarī, *Ta'rīkh*, vol. 9, 206-220, 239-246; Ibn al-'Athīr, *al-Kāmil*, vol. 6, 206-212, 225-226, 229-233; Ibn al-'Imād, *Shadharāt*, vol. 2, 129-130; Kennedy, *The Prophet*, 180-181.

[384] See the entry "Ḳarmaṭians" in Gibb and Kramer, *The Shorter Encyclopedia of Islam*, 218-223; al-Ṭabarī, *Ta'rīkh*, vol. 9, 342-346; Ibn al-'Athīr, *al-Kāmil*, vol. 6, 363-366.

[385] Al-Shahrastānī, *al-Milal wa al-Niḥal*, vol. 2, 228-229; al-Baghdādī, *al-Farq bayn al-Firaq*, 218-219; Ibn al-'Imād, *Shadharāt*, vol. 2, 171-172. The Qarāmiṭa were, in fact, a branch of the Ismā'īlī movement, see Kennedy, *The Prophet*, 287-292.

[386] Al-Ṭabarī, *Ta'rīkh*, vol. 10, 346; Ibn al-'Athīr, *al-Kāmil*, vol. 6, 366.

[387] Al-Ṭabarī, *Ta'rīkh*, vol. 10, 345; Ibn al-'Athīr, *al-Kāmil*, vol. 6, 365.

[388] Al-Shahrastānī, *al-Milal wa al-Niḥal*, vol. 2, 228-229; al-Baghdādī, *al-Farq bayn al-Firaq*, 218-219; Ibn al-'Imād, *Shadharāt*, vol. 2, 171-172.

[389] Kennedy, *The Prophet*, 290-292. Another group which followed equally indiscriminate and ruthless methods of slaughter appeared in the 5th/11th century. They were known as the Assassins, and belonged to the Nizārī Ismā'īlī branch. They were a secret society which became infamous for their use of assassinations as a primary method for fighting their opponents. They were particularly infamous for strangling their victims to death, and hence, became known as the Khunnāq. As we will see, Muslim jurists discussed how the Khunnāq should be treated. On the Assassins, see the article in Gibb and Kramers, *Shorter Encyclopedia of Islam*, 48-49; Edward Burman, *The Assassins: Holy Killers of Islam* (London: Aquarian Press, 1987), esp. 26-27; Marshall Hodgson, *The Order of Assassins: The Struggle of the Early Nizārī Ismā'īlī Against the Islamic World* (New York: AMS Press, 1955), esp. 82-84; Bernard Lewis, *The Assassins: A Radical Sect in Islam* (Oxford: Oxford University Press, 1967), esp. 38-96. Reportedly, some of the early Khawārij and Shī'ī ghulāt used strangulation as a primary method of assassination, see al-'Ash'arī, *Maqālāt*, vol. 2, 157.

the Zanj and the Qarāmiṭa were not rooted in juridical and historical precedent. 'Alī had dealt with the Khawārij, and there was a wealth of historical precedent available to the jurists in discoursing on the Khawārij. Furthermore, the use of esoteric and gnostic theology by the Zanj and the Qarāmiṭa made their categorization, from a juristic point of view, quite problematic. Nevertheless, not all precedents set in the 3rd/9th century were of such a nature that they would motivate Muslim jurists to react by declaring all rebellions and all rebels evil and beyond the pale of law. The realities of the 3rd/9th century were complex, and did not afford Muslim jurists the luxury of reacting to a one-sided unitary historical precedent. Some rebellions seemed to enjoy widespread popular support. Additionally, at times, the conduct of government forces or forces allied to the government were no less terroristic in nature.

For example, in 250/864-5, a major 'Alid rebellion led by Yaḥyā b. 'Umar took place in Kūfa. The rebellion was joined by, among others, the bedouins and Zaydīs of the city, and received wide popular support in Baghdād as well. According to the sources, this was the first 'Alid rebellion to receive wide support by the Baghdādīs.[390] Yaḥyā was eventually defeated and killed that same year. Nonetheless, when the 'Abbāsids tried to display his head in Sāmarrā there was sufficient amount of popular discontent that the head was promptly brought down. Another attempt was made to do the same in Baghdād which failed due to popular discontent as well. Finally, the head of the 'Alid was put to rest and buried. Many of the men taken prisoner in the rebellion were pardoned and released.[391] In 251/865, another 'Alid rebellion in Kūfa met a different fate. Al-Ḥusayn b. Muḥammad, the rebel, was initially supported by the tribe of Banū Asad and Kūfan Zaydīs, who apparently, were wool manufacturers. The rebellion was initially successful in Kūfa and enjoyed considerable support until Muzāḥim b. Khāqān launched a counter-attack.

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[390] Al-Ṭabarī, *Ta'rīkh*, vol. 9, 135; Ibn al-'Athīr, *al-Kāmil*, vol. 6, 157.

[391] Al-Ṭabarī, *Ta'rīkh*, vol. 9, 136; Ibn al-'Athīr, *al-Kāmil*, vol. 6, 157. Some of the released prisoners joined another 'Alid rebellion about a year later. Each of the repeat offenders were flogged 500 lashes, see al-Ṭabarī, *Ta'rīkh*, vol. 9, 166.

Muzāḥim b. Khāqān (d. 253/867) was one of the military commanders supporting the caliph al-Musta'īn (r. 248/862 - 252/866), and who later fought against the Turks in the siege of Baghdād in 252/865. Muzāḥim, after a short battle, defeated the 'Alid rebel, but when he entered Kūfa, its hostile inhabitants pelted him with stones. Muzāḥim took swift and decisive revenge. He bombarded Kūfa with flame throwers, burning most of the marketplaces and many of the homes. He imprisoned all the 'Alids in the city, and took the slave girls of the 'Alid rebel. He also took a free woman who apparently worked as a servant for the 'Alid rebel and had her auctioned off in front of the mosque. The rival caliph, al-Mu'tazz (r. 252/866 - 255/869), apparently, was sufficiently impressed by Muzāḥim's performance that he wrote to Muzāḥim offering him ample rewards if he would join him.[392]

The conduct of rebels and those who fought rebels is a legally material element. The conduct is not material just because it is precedent. More importantly, the matter of conduct helps inform the culture of jurists as to what should be acceptable conduct. In other words, the conduct of rebels and the treatment of rebels may assist a jurist in constructing a normative argument. The normative argument will be focused on what should be the conduct or treatment of rebels. The normative argument of a jurist takes into account what took place in actuality but also responds to this actuality with a judgment; it either approves or disapproves of the reported conduct. Although the reported conduct might materially differ from what the juridical culture normatively argues, that does not necessarily motivate the juridical culture to alter or reform its discourses in the immediate future. The juridical culture often responds to events well after the fact. In fact, because of the specificity, and often the conservatism, of juridical culture, jurists will more often than not respond to reality only after it has become persistent, pervasive and dominant. This, at times, means that juridical culture will revise or reform its argument after it has become apparent that there is a considerable gap between the constructed normative argument and the social and political reality. This means that quite frequently there is a "lag time" between the social and political circumstances and a juridical reformation. I elaborate upon this point below.

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[392] Al-Ṭabarī, *Ta'rīkh*, vol. 9, 166. Al-Mu'tazz was picked as the rival caliph by the Turkish forces, and he was the one who laid siege to Baghdād. He defeated al-Musta'īn and sent him into exile. Before long, he was assassinated by the same Turkish forces who brought him to power.

Beyond the issue of conduct, the 3rd/9th century presented Muslim jurists with a very different problem--one that related more to the area of constitutional rather than criminal law. The problem was that of: Who is a rebel? This issue did not present itself for the first time in the third or fourth century. As discussed earlier, this issue existed from the time of the conflict between 'Alī and his opponents, and there is hardly any period in Islamic history that was not plagued by rebellions. However, the nature of the question has changed. Before the third century, rebellions sought to represent and lead the entire Muslim *'umma*. Even if the rebellion originated from the periphery, it sought to reach the center and lead all Muslims. They were not partial rebellions but totalistic rebellions. Ibn al-Zubayr, al-'Ash'ath, or al-Nafs al-Zakiyya did not seek a secession; rather, in principle, they sought a full-scale revolution that would represent Islam and Muslims everywhere. In contrast, many of the rebellions of the third century and onwards sought to carve out a part of the *'umma* and establish a local or partial rule. In other words, many of the later rebellions were secessionist movements and not revolutions. The goal was not to unite all Muslims under a single and just rule, but to divide Muslims through achieving a degree of regional autonomy.[393]

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[393] Riḍwān al-Sayyid, *al-'Umma*, 122, argues that a rebel in Islamic thought was expected to bring his call (*da'wa*) from the periphery to the center in order to unite the nation under one message. A *bāghī* was one who rebelled in the periphery and did not seek to extend his *'aṣabiyya* (tribalism or nationalism) beyond the periphery. He would be tolerated because his *'aṣabiyya* is still a part of the *'umma*. But because he did not seek to unite the full nation under a single call, he would be considered an outsider (*mutamarrid*). See also his introduction to *al-'Asad wa al-Ghawwāṣ*, ed. Riḍwān al-Sayyid (Beirut: Dār al-Ṭalī'a, 1992), 5-35. I must admit that I find his argument hopelessly vague. It is possible that he is arguing that the jurists expected a dissenter to seek to represent the *jamā'a*, and that if a dissenter sought to represent regional or local interests without aspiring to represent the full *'umma*, he was considered to be a deviator who would be tolerated but not endorsed. If this is, in fact, his argument, he does not explain what happens to a rebel who claims to represent the full *'umma*. Furthermore, al-Sayyid seems to base his argument on the genre of literature known as the mirror of princes (*naṣīḥat al-mulūk*). This genre of literature gives advice to rulers on how to preserve and protect politics and religion. As a methodological matter, it is dangerous to draw conclusions on the legal status of rebels based on this genre of literature. In

In the 3rd/9th century, the duly deputized governor of Egypt, Aḥmad b. Ṭūlūn (d. 270/884) declared his virtual independence from his bosses in Iraq and threatened to capture Syria as well. Ibn Ṭūlūn never stopped formally acknowledging the ‘Abbāsids as the legitimate caliphs, and is reported to have continued to pay them a tribute in return for recognition. However, for all practical purposes he formed an independent dynasty, which was destroyed by the ‘Abbāsids in 292/905.[394] Ibn Ṭūlūn was not willing to completely sever his formal connection with the ‘Abbāsids, however several other rebels did establish independent states. For example, around the mid-third century, al-Hasan b. Zayd, after a series of rebellions succeeded in establishing a Zaydī state in the South of the Caspian Sea, Iran. Meanwhile, al-Qāsim al-Rassī, who first rebelled during the reign of al-Ma’mūn, succeeded in establishing an independent Zaydī state in Ṣa‘da, Yemen.[395] Furthermore, by the end of the third century the Fāṭimids, a branch of the Isma‘īlī's, established an independent state in North Africa, and in 297/909 al-Mahdī (r. 297/909 - 322/934) was declared as a rival caliph to the ‘Abbāsids in Raqqāda in ’Ifrīqiya.[396] Of course, this was not an entirely novel situation for there has been autonomous or semi-autonomous

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fact, as discussed later, many jurists argued that those who rebel in the periphery for tribal reasons (*‘aṣabiyya*) are not to be considered rebels. Rather, they are considered bandits and treated as such. It is possible, however, that al-Sayyid is not talking about the law of the jurists but about the conduct of the government, i.e. the law in administrative practice. The caliph would never tolerate a rebel who wanted to capture Baghdād, for example, and depose him, but the caliph could ignore or even, under conditions, endorse a rebel in a peripheral territory who would offer offer nominal symbolic homage to him. If, in fact, this is al-Sayyid's argument, I agree with him.

Bernard Lewis, *Islam in History*, 318, argues that the Muslim juristic discourses on rebellion had in mind secession, not revolution. Muslim jurists were discoursing on secessionist movements, not revolutionary movements. One suspects that this is similar to what al-Sayyid has in mind as well. However, if the implication of this argument is that secessionary movements were tolerated by the jurists but revolutions were not, this is clearly wrong. If, on the other hand, the implication is that secession was discoursed upon but revolution was not imagined or addressed, that is false as well.

[394] See H.A.R. Gibb, "Ṭūlūnids," in *Encyclopedia of Islam*, 1st ed., vol. 8, p. 834-6.

[395] See R. Strothmann, "Zaidīya" in *Encyclopedia of Islam*, 1st ed., vol. 8, 1196-8. Also see Clifford Edmund Bosworth, *The New Islamic Dynasties* (New York: Columbia University Press, 1996), 96-98.

[396] See M. Canard, "Fāṭimids," in *Encyclopedia of Islam*, 2nd ed. The pro-Shī‘ī Buwayhids (Būyids) entered Baghdād in the 4th/10th century, and for more than a hundred years exercised tutelage over the ‘Abbāsid caliphate, but they never eliminated the caliphate. See Claude Cahen, "Buwayhids," in *Encyclopedia of Islam*, 2nd ed.

dynasties and principalities since the 2nd/8th century.[397] Nevertheless, we are not just addressing the historical reality but, more importantly, the impression it has left on jurists. The existence of autonomous or semi-autonomous principalities did not affect the discourses on rebellion by jurists living in Egypt, the Shām, Iraq or Arabia under the 'Abbāsids until well after the 3rd/9th century. And even when it did affect them, it did not necessarily lead to a radical or revolutionary reformulation of the law. Rather, the law was revised in subtle and conservatively measured ways. There are two main reasons for this. First, the declared autonomous principalities were on the peripheries of the 'Abbāsid caliphate, and therefore, for the most part could be ignored, at least until the 3rd/9th century. Second, even the events of the 3rd/9th century, for the most part, are not reflected in the discourses of Muslim jurists until much later because of, as argued above, the tendency of the law to have a delayed response to social and political events. This second point needs further elaboration.

I have argued above that law at times is responsive to social and political demands. In fact, law often acts to motivate and shape social realities. Nonetheless, to quote Watson, "Law is [also] very traditional, slow to modify its rules, structure, and mode of creation."[398] Once jurists develop a structure and a set of rules, and build a discourse on these rules, it takes considerable creativity, and sometimes opportunism, to change the rules.[399] Jurists exist within a specific juridical culture in which jurists talk primarily to jurists. As Watson has argued:

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[397] The most obvious example is the establishment of the 'Umayyad dynasty in the Iberian peninsula *starting* 138/756. The following are all examples of dynasties that maintained autonomous or semi-autonomous status from the 'Abbāsids in the 2nd or 3rd centuries: the apparently Shī'ī Idrīsids in Morocco (starting in 172/789); the Kharījī Rustamids in western Algeria (s. 161/778); the Kharījī, at first, then Shī'ī Midrārids in south-eastern Morocco (s. 208/823); the Sunnī Aghlābids in Ifrīqiya (s. 184/800); the Sunnī Ziyādids in Yemen (s. 203/818); the apparently Sunnī Ya'fūrids in Yemen (s. 232/847); the apparently Sunnī Shirwānid Shahs in Armenia, Azerbaijan (s. 183/799); the Sunnī Hāshimids of Darband (s. 255/869); the apparently Shī'ī Justānids in Daylam (s. 175/791); and the Sunnī Sājids in Azerbaijān (s. 276/889). See Bosworth, *The New Islamic Dynasties*, 11-13, 25-26, 27-28, 29-30, 31-32, 99, 100, 140-142, 143-144, 145, 147.

[398] Alan Watson, *Sources of Law, Legal Change, and Ambiguity* (Philadelphia: University of Pennsylvania, 1984), 111. I do not completely agree with the proposition that law is inherently traditional or invariably slow.

> "Law ... despite its practical impact, is above all and primarily the culture of lawyers and especially of the lawmakers -- that is, of those lawyers who, whether as legislators, jurists or judges, have control of the accepted mechanisms of legal change. Legal development is determined by their culture; and social, economic, and political factors impinge on legal development only through their consciousness. This consciousness results from the lawmakers' being members of the society and sharing its values and experiences, though of course they are members with a particular standing. Sometimes this consciousness is heightened by extreme pressures from other members of the society, but always the lawmakers' response is conditioned by the legal tradition: by their learning, expertise, and knowledge of law, domestic and foreign."[400]

This does not mean that jurists are uninterested in social or political reality.[401] Even if a particular jurist is interested in the circumstances and conditions of the age, to effectuate legal change, a jurist has to defy or distinguish already established legal authority. This is often a very risky and contentious process, and it is also often a very protracted and long process.[402] Of course, if there is sufficient political or social pressure the law might change rather quickly to serve certain dominant interests, and preserve its own legitimacy. However, the legitimacy of a legal culture often depends on its ability to uphold precedent and resist radical change. Even with the existence of political or social pressure, law must also respond to the mandates and pressures imposed by the practice of the legal culture. Frequently, this means that jurists will not disentangle themselves from the weight of precedent, and will not respond immediately to political or social pressures. Therefore, one might find that the social and political realities of a particular age are not addressed until a century or more later. Consequently, the circumstances of the third century might not be addressed until the fourth century or even later. As we will see, jurists writing in the third century do not necessarily reflect the realities of that century. Rather, they are still addressing the law of rebellion that was formulated in response to the second or first century of Islam. This delay between social and political circumstances and the juridical response is directly attributable to the nature of juristic culture which is often conservative. The juristic culture is conservative because it bases itself in the legitimacy of prior authority, and, therefore, often needs to disentangle itself from the weight of precedent.[403] Importantly, the more developed the juridical culture, the more it labors under the weight of precedents, rules and prior authority. Therefore, the more developed a juridical culture, the less flexible it is, and the greater the "lag time" between the social and political realities and the legal response.

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[399] Alan Watson, *Failures of the Legal Imagination*, 35-59 argues that even legislation, which tends to be the most radical way of changing law, is often non-responsive and slow to change. On opportunism and pragmatism as motivators of legal change, see 87-101.

[400] Watson, *The Evolution of Law*, 118-119.

[401] Alan Watson argues that law has its own standard for existence and that it is largely autonomous and not shaped by social needs, Ibid., 115, 119. On the idea of legal revolutions, see Ibid., 109-114. I do not go this far. I believe that one can speak of tendencies in the legal culture but not inevitabilities. Legal culture does respond to social and political circumstances, especially if the interests of the influential and powerful are being affected. But legal culture does not always support change and, therefore, might resist. I would argue that often there is a considerable delay between the time a social or political need for change arises and when the conservatism of legal culture admits or allows a change. But as argued in the conclusion, law is not autonomous or always conservative or non-responsive. Law is semi-autonomous, and is often responsive and, at times, radical.

[402] This is why the most creative and innovative jurists are often the most maligned and criticized jurists. There are many examples of innovative jurists who were heavily criticized or who isolated themselves from society. Examples would include: Abū Isḥāq al-Shāṭibī (d. 790/1388), see Muhammad Khalid Masud, *Islamic Legal Philosophy: A Study of Abu Ishaq al-Shatibi Life and Thought* (New Delhi: International Islamic Publishers, 1989), 103; Abū al-Ḥasan al-Māwardī (d. 450/1058), see Ibn al-'Imād, *Shadharāt*, vol. 3, 286; Muḥammad Ibn Rushd (d. 595/1198), see al-Dhahabī, *Siyar*, vol. 21, 309; Yaḥyā al-Nawawī (d. 676/1277), see Ibn al-'Imād, *Shadharāt*, vol. 5, 354; 'Aḥmad Ibn Ḥazm (d. 456/1064), see Ibn al-'Imād, *Shadharāt*, vol. 3, 300; Jalāl al-Dīn al-Ṣuyūṭī (d. 911/1505), see Ibn al-'Imād, *Shadharāt*, vol. 8, 53.

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[403] Alan Watson comments that law is "typically backward-looking" and "inherently conservative." Watson, *The Evolution of Law*, 119. But as the author notes: "This does not mean there are not radical lawyers. But except when they are legislators, they are "bad" lawyers -- not in an ethical sense, but in the sense that they have to use arguments outside the reach of the accepted mode of legal reasoning. They, therefore, appear to the generality of lawyers to be at the intellectual mercy of traditionalists. *Pointing this out is in no sense to be construed as support for conservative positions.* In fact, precisely because of the force of the legal tradition, legal change is frequently the result of efforts of non-lawyers or of lawyers outside the tradition." Ibid., 145, n. 6 (emphasis mine). I, to a large extent, concur.

The Emergence of the Discourse on Rebellion: From Reports to Law

Until the mid 2nd/8th century of Islam there is no jurisprudence on rebellion but only reports. The reports constitute primitive, undeveloped attempts at jurisprudence, however, they lack the systematic argumentation of jurisprudence. They make a point but do not explore the implications of the point, and they do not categorize or classify acts according to a consistent or coherent scheme. In many ways, reports are raw material that is co-opted and constructed in the service of jurisprudence.[404] By the mid-second century, there were many circulating reports or traditions that were relevant in one way or another, to the theoretical issue of rebellion. These traditions consisted of two distinct types. Reports that related directly to the issue of obedience to those in power, and reports that related only indirectly to the matter. The second type of reports mostly addressed the opinions and purported conduct of the companions during the civil wars between 'Alī and his opponents. We have already mentioned quite a few of these traditions in the context of discussing the debates on the verses on *ḥirāba* and *bagy*. We will now address these two types of reports in the context of examining what may be called the obedience and counter-obedience traditions. For our purposes, the reports, in either case, are interesting only to the extent that they exhibit early tendencies, and to the extent that they become the raw material that jurists ultimately worked with. Dating these reports or having a sense of when they made their first appearance is an admittedly difficult task.[405] However, for the purposes of this study, one could get a fairly strong sense of which reports appear in the early juristic writings, and which reports seem to suddenly appear in later juristic discourses.

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[404] This is why, for example, al-Shāfi'ī tells the traditionists, "You are the chemists and we are the doctors (*'antum al-ṣayādila wa naḥnu al-'aṭibbā'*)," al-Dhahabī, *Siyar*, vol. 10, 23. Abū Ḥanīfa reportedly makes a similar argument. He argues that one who collects *ḥadīth* but does not study jurisprudence is like a person who collects medicine but does not know how to treat diseases. Al-Makkī, *Manāqib*, 350.

[405] See the engaging study by Michael Cook, "Eschatology and the Dating of Traditions," *Princeton Papers in Near Eastern Studies* 1 (1992): 23-47. Also see, on the development of *sunna* and *ḥadīth*, Fazlur Rahman, *Islamic Methodology in History* (Delhi: Adam Publishers, 1994), esp. 27-84.

The Traditions of Obedience

Al-Ḥāfiẓ Abū Bakr al-Shaybānī (d. 287/900) quotes an impressive array of reports attributed to the Prophet on the necessity of obeying those in power. A genre of these reports counsel that a Muslim should obey whoever is in power, even if the one in power is a "mutilated Abyssinian slave."[406] The symbolic construct here is not necessarily one of blind obedience but one of non-critical obedience. In other words, one can possibly interpret this genre of reports to simply mean that the physical, racial or ethnic attributes of a ruler are irrelevant. However, a similar genre of reports go further, and assert that the Prophet commanded that Muslims must obey rulers under all circumstances. A typical form for this genre is the following: It is reported that the Prophet said, "Listen and obey, in hardship and in good, in what is pleasant or unpleasant, and prefer them [the rulers] over yourself even if they usurp your wealth or strike your backs."[407] Some reports provide a justification for this methodical imperative of obedience by claiming that the Prophet said: "Who obeys me [the Prophet], he has obeyed God, and who disobeys me, he has disobeyed God. Who obeys the ruler *(al-'amīr)*, he has obeyed me and who disobeys the ruler, he has disobeyed me."[408] Several traditions attributed to the Prophet create a moral distance between the actions of rulers and their followers. As long as Muslims are obedient, they will not be held responsible, before God, for the indiscretions or injustices of rulers. Rulers are solely liable for their own injustices, Muslims are responsible for a separate religious imperative of obedience.[409]

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[406] Al-Ḥāfiẓ Abū Bakr al-Ḍaḥḥāk b. Makhlad al-Shaybānī, *Kitāb al-Sunna*, ed. Muḥammad Nāṣir al-Dīn al-'Albānī (Beirut: al-Maktab al-Islāmī, 1993), 29, 445, 491. This version as well as other versions are in 'Aḥmad Ibn Ḥanbal (d. 241/855), *Musnad* (Beirut: al-Maktab al-Islāmī, 1993), vol. 3, 143, 215; vol. 5, 209, 221. Many of the traditions emphasizing obedience can be found in Majd al-Dīn Abī al-Sa'ādāt al-Shaybānī Ibn al-'Athīr al-Jazrī (d. 606/1209), *Jāmi' al-'Uṣūl fī Aḥādīth al-Rasūl* (Beirut: Dār al-Kutub al-'Ilmiyya, 1998), vol. 4, 46-56.

[407] Al-Shaybānī, *Kitāb al-Sunna*, 478, 479. Ibn Ḥanbal, *Musnad*, vol. 2, 501, vol. 5, 402; Muḥyī al-Dīn Abū Zakariyā Yiḥyā b. Sharaf al-Nawawī, *Sharḥ Ṣaḥīḥ Muslim*, ed. Khalīl al-Mīs (Beirut: Dār al-Qalam, n.d.), vol. 12, 480.

Nonetheless, these reports must go further. A good legal mind could distinguish these reports, and maintain that they are largely inapposite to a case of rebellion. For example, one could argue that these traditions relate to the duty of obedience but they do not relate to the issue of choice of leader. In other words, once we acknowledge a specific person as a ruler then obedience is due. However, a group that chooses an alternative ruler, a leader of a rebellion for example, owes, pursuant to these traditions, the same unequivocal obedience to the leader of the rebellion. Hence, other reports are needed that more explicitly and specifically prohibit rebellion. One such report states that Abū Dharr al-Ghifārī (d. 32-33/652-653), the Prophet's companion, was sleeping in the Medina mosque when the Prophet woke him up, and said, "'Why do I see you asleep here?' Abū Dharr said: 'Oh Prophet, I was overcome by sleep. The Prophet asked: 'What would you do if you were forced out of it [the mosque of Medina]? Abū Dharr said: 'I would accept the holy blessed land of Shām.' The Prophet then inquired: 'What would you do if you are forced out of it?' Abū Dharr then puzzled: 'What should I do? Should I take my sword and go out striking with it [i.e. rebel]?' The Prophet said: 'Shall I tell you what is better and nearer to piety? (The Prophet repeated the phrase twice.) You listen and obey, and go whichever way they lead you.'"[410] The report is obviously staged, but the dramatic

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[408] Al-Shaybānī, *Kitāb al-Sunna*, 492-494. In a different version of this type of *ḥadīth* the Prophet is reported to have said: "Be steadfast in your obedience to your leaders, and do not contravene them, for obeying them is obeying God, and disobeying them is disobeying God," Ibid., 499. Ibn Ḥanbal, *Musnad*, vol. 2, 322, 333, 356, 412, 450, 622, 677. A version of this report says that even if the rulers pray sitting down when they are supposed to pray standing up one should do the same. Ibid., 126, 509, 548, 617. Some jurists maintain that this *ḥadīth* only applies to obeying military chiefs (*wujūb al-ṭā'a li-umarā' al-jaysh*).

[409] Al-Shaybānī, *Kitāb al-Sunna*, 485, 496; Abū Muḥammad 'Abd al-Raḥmān al-Rāzī (d. 327/938), *'Ilal al-Ḥadīth* (Beirut: Dār al-Ma'rifa, 1985), vol. 2, 419.

effects of the story are an integral part of the emotional impact of the message. Despite the emotional place of holy mosques in which one feels sufficiently tranquil and secure to the point of falling asleep, and contrary to the intuitive impulse to resist by force any denial of the right to be in a mosque, it is closer to piety not to use force. Even if one is expelled from the most holy of mosques one must not rebel. The message of this *ḥadīth* is bolstered by reports that explicitly state that one should not contest or rebel against unjust rulers as long as the rulers permit prayers to be performed. The most a Muslim should do is to passively and quietly condemn the injustices and sins being committed, but a Muslim should not rebel (*wa lā yanzaʿan yadan min al-ṭāʿa.*)[411] The message is made abundantly clear in the genre of traditions which state that whoever rebels, after the nation (*ʾumma*) or community (*jamāʿa*) has united or agreed on a leader, should be killed, whoever he may be.[412] Another report of the same type asserts that the Prophet said: "The blood of a Muslim who attests that there is no God but God and that I am the Prophet of God, may not be shed except for three reasons: 1. Adultery, 2. Murder, and 3. the abandonment of religion and rebellion against the community ("*al-tārik li dīnihi al-mufāriq li'l jamāʿa*").[413] Other reports prohibit the cursing, slandering or even hating of

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[410] Ibid., 497; Ibn Ḥanbal, *Musnad*, vol. 5, 203. The expression "holy and blessed land of Shām" most probably means Syria. It is quite likely that the report is a pro-'Umayyad fabrication justifying Abū Dharr's banishment by Muʿāwiya away from Medina and Syria. It is possible, but not probable, that the report is referring to the Jerusalem Mosque.

[411] Ibid., 495. Some reports state that rulers should not be fought as long as they pray, Ibid., 501. In another tradition of the same type, the Prophet is reported to have said there will be rulers (*'umarā'*) who will cause the hearts of people to be repulsed and the skin of people to cringe [presumably with disgust or fear]. The Prophet was asked should we fight them? The Prophet said: No, as long as they permit prayer. Ibid., p. 498. Same report is in Ibn Ḥanbal, *Musnad*, vol. 6, 31, vol. 3, 35; al-Rāzī, *ʿIlal al-Ḥadīth*, vol. 2, 422, reports the same version, but also reports a version that provides that rulers should be obeyed as long as they pray and fast, Ibid., 405.

[412] Al-Shaybānī, *Kitāb al-Sunna*, 512; al-Nawawī, *Sharḥ Muslim*, vol. 12, 483-4. For a different version on that who abandons the *jamāʿa* and rebels, see Ibn Ḥanbal, *Musnad*, vol. 5, 481, 503.

[413] Al-Shaybānī, *Kitāb al-Sunna*, 30-31, 421. This version of the *ḥadīth* is in Ibn Ḥanbal, *Musnad*, vol. 1, 477, 535, 556; vol. 6, 205. A different version of this *ḥadīth* provides that a blood of a Muslim may not be shed except for adultery, murder and apostasy, Ibn Ḥanbal, *Musnad*, vol. 1, 74, 76, 201; vol. 6, 69, 206, 233, 243. The caliph ʿUthmān is reported to have cited this *ḥadīth* to his assassinators before he was killed. The point being that since he did not commit murder, adultery or apostasy, assassinating him would be unjust; see Ibn Ḥanbal, *Musnad*, vol. 1, 84-85. Of course, the difference in the two

rulers regardless of their merit or lack of merit.[414] The only recourse against unjust rulers is patience.[415] These reports typically command that one steadfastly adhere to the community and not deviate from the *jamāʿa* (plurality or community).

These reports, as strong and clear as they may sound, beg the question: What is the *jamāʿa* to which one must hold steadfastly? It is possible to dilute much of the strength of these reports by debating and reconstructing the definitions of *jamāʿa*. For example, Ibn Qayyim (d. 751/1350-1) argued that the *jamāʿa* means those who follow the straight path (al-*ḥaqq*), and adhere to the truth. Therefore, the *jamāʿa* could be a single person and the vast majority of Muslims could be *contra* to the *jamāʿa*. For instance, in the days of the *miḥna*, Ibn Qayyim argued, the vast majority of scholars deviated from the truth and Aḥmad b. Ḥanbal persevered on the right path. Hence, he alone became the *jamāʿa*, and the rest of the people deviated from the *jamāʿa*.[416] Of course, Ibn Qayyim's argument is not entirely original.[417] The traditionist Muḥammad al-Bukhārī (d. 256/870), much earlier raised the issue of what one should do if there is no *jamāʿa*. Al-Bukhārī then cites a tradition that asserts that in the absence of a *jamāʿa*, one should isolate himself and

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versions is very important. Effectively, the first version permits the killing of a rebel, the second version limits the authorization of killing to an apostate. The theoretical question, however, is how does one distinguish between a rebel and an apostate? In my view these various versions represent competing trends or needs in early Islam. The complex legal classifications and definitions of rebellion versus apostasy came later.

Several traditions condemn one who abandons the *jamāʿa*, and provide that such a person will die in a state of *jāhiliyya* (a state of ignorance which is commonly associated with the condition of Arabs before Islam), al-Shaybānī, *Kitāb al-Sunna*, 39-43, 420, 423. A version of these reports creates a nexus between the *jamāʿa* and the obedience to the ruler. It states: "Whoever rebels and abandons the community dies a death of ignorance (*man kharaja min al-ṭāʿa wa fāraqa al-jamāʿa māta mītatan jāhiliyya*)," Ibid., 422, 492. This means that, effectively, the person dies a non-Muslim. A different version provides: "Three types of people God will not care for, one who abandons the *jamāʿa*, disobeys his ruler or dies a sinner," Ibid., 490.

[414] Al-Shaybānī, *Kitāb al-Sunna*, 473-476.

[415] Ibid., 509-511; al-Rāzī, *ʿIlal al-Ḥadīth*, vol. 2, 414.

[416] Shams al-Dīn Abū ʿAbd Allāh Muḥammad b. Abī Bakr b. Qayyim al-Jawziyya, *Aʿlām al-Muwaqqiʿīn ʿan Rabb al-ʿĀlamīn*, ed. Ṭāhā ʿAbd al-Raʾūf Saʿd (Beirut: Dār al-Jīl, n.d.), vol. 3, 397-398; Idem, *ʾIghāthat al-Lahfān min Maṣāʾid al-Shayṭān*, ed. Ḥassāb ʿAbd al-Mannān and ʿIṣām al-Ḥurastānī (Beirut: Muʾassasat al-Risāla, 1994), vol. 1, 97-98.

[417] In fact, in order to prove his point, Ibn Qayyim cites to a whole set of earlier opinions, Ibid.

abandon all the contentious groups in society.[418] Effectively, Ibn Qayyim and others took the reports on the possibility that a *jamā'a* would not exist, and reconstructed it into a discourse in which the minority, or even one person, would become the *jamā'a*. Regardless of the merits of these arguments, they demonstrate the power of theological or legal interpretation in distinguishing and reconstructing traditions (raw material) in order to reach certain results.

Later, we will have an occasion to discuss the reconstructive activity of Muslim jurists in relation to the traditions on obedience. At this point, it is important to note that the traditions emphasizing the impermissibility of using force against Muslims or the necessity of obedience to those in power were quite widespread in the first two centuries of Islam. Most of the early collections of *ḥadīth* include one version or another of these kinds of reports.[419] Although most of these sources were written in the 3rd/9th century, these traditions must have come into circulation much earlier. Considering the scale and nature of the rebellions during the 'Umayyad period, it is very likely that most of the traditions demanding unquestioning obedience came to existence in the 1st/7th century.[420] Furthermore, these traditions seem to have been incorporated in the jurisprudential discourses early on. 'Abd Allāh b. Aḥmad (d. 290/902) reports that his father, Aḥmad b. Ḥanbal (d. 241/855), strongly disapproved of those who disobeyed the ruler or who failed to support him.[421] Even earlier, the Ḥanafī judge Abū Yūsuf (d. 183/799) cites many of these traditions, including a tradition attributed to the Prophet, which commands that one should obey every ruler ('*amīr*) and pray behind every *'imām* without distinction.[422] Another tradition, cited by Abū Yūsuf alleges that al-Ḥasan al-Baṣrī reported that the Prophet said: "Do not slander the rulers (*al-wulā*), for if they do good, they will be rewarded, and you should be grateful. If they do evil, they will incur the sin [of the deed], and you must show patience. They [the rulers] are God's punishment which God sends upon whomever He wants. Do not meet God's punishment with anger and resistance. Meet God's punishment with acceptance and prayer."[423]

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[418] Abū 'Abd Allāh Muḥammad b. Ismā'īl al-Bukhārī, *Ṣaḥīḥ al-Bukhārī* (Cairo: Dār 'Iḥyā' al-Kutub al-'Arabiyya, n.d.), vol. 4, 225. This tradition is referring to the first civil war, and is advocating non-involvement and neutrality.

[419] Al-Bukhārī (d. 256/870), *Ṣaḥīḥ*, vol. 4, 221-223 (traditions emphasizing obedience, patience and the impermissibility of using weapons against fellow Muslims); Abū 'Īsā Muḥammad b. Sūra al-Tirmidhī (d. 297/909), *al-Jāmi' al-Ṣaḥīḥ*, ed. Kamāl al-Ḥūt (Cairo: Dār al-Ḥadīth, 1987), vol. 4, 49, 404-5, 423, 458 (traditions emphasizing obedience, patience, the merits of adhering to the *jamā'a*, and not rebelling or using weapons against fellow Muslims); Abū 'Abd al-Raḥmān 'Aḥmad b. Shu'ayb b. 'Alī al-Nasā'ī (d. 303/915), *Sunan* (Beirut: Dār al-Qalam, n.d.), vol. 4, 90-93 (traditions emphasizing adhering to the *jamā'a* and obedience); Abū 'Abd Allāh Muḥammad b. Yazīd Ibn Māja (d. 273/886-7), *Sunan* (Beirut: Dār 'Iḥyā' al-Kutub al-'Arabiyya, n.d.), vol. 2, 847, 860, 954-5 (traditions emphasizing adhering to the *jamā'a*, obedience and impermissibility of using weapons against Muslims); Sulaymān b. al-'Ash'ath al-Sijistānī al-'Azdī (d. 275/888-9), *Sunan* (Cairo: Dār al-Ḥadīth, 1988), vol. 4, 92-99 (traditions emphasizing not getting involved in *fitna*); Abū Bakr 'Aḥmad b. 'Abd al-Khāliq al-'Atakī al-Bazzār (d. 292/904-5), *al-Baḥr al-Zakhkhār*, ed. Maḥfūẓ al-Raḥmān Zayn Allāh (Medina: Maktabat al-'Ulūm wa al-Ḥikam, 1988), vol. 5, 173, 329, 334, 386 (traditions emphasizing obedience, adhering to the *jama'a* and not using force against other Muslims); Abū Muḥammad 'Abd Allāh b. 'Abd al-Raḥmān al-Dārimī (d. 255/869), *Al-Sunan*, ed. Fawāz Zamrālī and Khālid al-'Alamī (Beirut: Dār al-Kitāb al-'Arabī, 1987), vol. 2, 314-315 (traditions emphasizing obedience, patience and not using weapons against fellow Muslims); Sa'īd b. Manṣūr b. Shu'ba al-Khurasānī (d. 227/841), *Sunan*, ed. Ḥabīb al-Raḥmān al-'A'ẓamī (Beirut: Dār al-Kutub al-'Ilmiyya, n.d.), vol. 2, 192-196 (traditions emphasizing the duty of obedience and adhering to the *jamā'a*); Abū al-Ḥusayn Muslim b. al-Ḥajjāj b. Muslim al-Qushayrī al-Naysābūrī, (d. 261/875) *al-Jami' al-Ṣaḥīḥ* (Beirut: Dār al-Ma'rifa, n.d.), vol. 1, 69, vol. 6, 13-25 (traditions emphasizing obedience, adhering to the *jamā'a*, not rebelling against leaders, patience and not using weapons against fellow Muslims), Ibn Abī Shayba (d. 235/849), *al-Muṣannaf*, vol. 7, 567, 687-8 (traditions emphasizing obedience, and permissibility of supporting the war efforts of unjust rulers). Most of these traditions are reproduced in Ibn al-'Athīr al-Jazrī, *Jāmi' al-'Uṣūl*, vol. 4, 46-56.

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[420] The nature of the rebellions demanded justification of the harsh measures taken against their initiators. The opponents of the 'Umayyads, such as Sa'd b. 'Ubāda, Abū Dharr, Ḥusayn and the people of Medina, were morally influential. The obedience tradtions were a part of the 'Umayyad compaign against their opponents. Later, the 'Abbāsids used the same traditions against their opponents.

[421] 'Abd Allāh b. 'Aḥmad, *Masā'il*, 257. One can only guess as to what this position exactly means in light of 'Aḥmad Ibn Ḥanbal's position in the *miḥna*. It is possible that the tradition belongs to the time of al-Mutawakkil when 'Aḥmad was a favorite of the government.

[422] Abū Yūsuf, *Kitāb al-Kharāj*, 9-10. This tradition is nearly identical to the one discussed earlier where Ibn 'Umar says that al-Ḥajjāj is God's punishment and should not be resisted. Ironically, al-Ḥasan al-Baṣrī is reported to have opposed al-Ḥajjāj and the 'Umayyad caliph 'Abd al-Malik, see Gibb and Kramers, *Shorter Encyclopedia of Islam*, 136. Reportedly, when al-Ḥasan was asked about al-Ḥajjāj, he said that al-Ḥajjāj is *qāsiṭ 'ādil*. This is a wonderful play on words. *Qāsiṭ 'ādil* literally means pious and just. But these words can be used in a very different sense. The Qur'ān, for example, says that the *qāsiṭūn* (plural form of *qāsiṭ*) will be the firewood of hell. Qur'ān 72:15. Here the word is used in the sense of those who shy or turn away from the right path. Similarly, *'ādil* could mean just, but it could also mean those who turn away. The Qur'ān states: "those you disbelieve *ya'dilūn* (i.e. turn away)." Qur'ān 6:150. This incident is reported in Ḥāfiẓ al-Dīn Muḥammad b. Muḥammad b. Shihāb b. al-Bazzāz al-Kurdarī, *al-Fatāwa al-Bazzāziyya*, printed in the margins of *al-Fatāwa al-'Ālamgīriyya = al-Fatāwa al-Hindiyya* (Beirut: Dār 'Ihyā' al-Turāth al-'Arabī, 1986), vol. 6, 336. The author who cites al-Baṣrī's play on words is quite unhappy about this precedent. He says that those who attempt to imitate this trick by calling the sulṭān of his age (author died 827/1423) an *'ādil* are *kuffār* (unbelievers) because it is well-established that the ruler is not just and this play on words is improper.

[423] Abū Yūsuf, *Kitāb al-Kharāj*, 10.

Another genre of traditions are even more specific in scope; they condemn the Khawārij or Ḥarrūriyya, and counsel Muslims not to get involved in *fitan*. We have already addressed some of the *fitan* traditions, but, generally, in their typical form the Prophet is quoted as predicting that there will come a time when civil discord will spread, and Muslims will fight each other. The Prophet then counsels that a pious Muslim should refrain from becoming involved in these compromising situations.[424] Alternatively, a companion, quite typically Ibn 'Umar, would advise other companions or pious Muslims not to become involved in rebellions, even against someone such as Yazīd b. Mu'āwiya, who is often considered the epitomy of injustice, impiety and corruption.[425] Some versions of the *fitan* reports specify that the people in Shām (the 'Umayyads), Ibn al-Zubayr in Mecca and the Qurrā' in Baṣra are all fighting over worldly affairs, and are all engulfed in a *fitna*, therefore, a Muslim must refrain from joining any of the contending parties.[426] The traditions specifically dealing with the Khawārij often assert that the sect had deviated from Islam and that they are the dogs of Hellfire.[427] Some reports specify that the Khawārij are to be considered the *bāghiya* (rebellious or deviant) group,[428] and encourage that they be fought and killed.[429] In many versions, the Khawārij are not referred to by name, rather they are identified by implication. These reports claim that there will come a time when zealots with little understanding of the religion will shed the blood of Muslims. If they are found, the reports assert, they must be killed wherever they may be found.[430] Other reports quote the Prophet as condemning the Rāfiḍa (Shīʻa), and calling upon all Muslims to fight them.[431] Arguably, because these traditions address specific historical conflicts, they tend to restrict the scope of the obedience traditions. In other words, by mentioning specific historical incidents or groups (such as the Khawārij or the rebellion of Ibn al-Zubayr or the Shīʻa), these traditions become applicable only to these particular sets of facts. For example, if the rebellion of the Khawārij or Ibn al-Zubayr is condemned, that does not necessarily mean that the rebellion of al-Ḥusayn b. ʻAlī or al-Nafs al-Zakiyya is equally reprehensible. Arguably, one can distinguish these reports on the facts of each case. As discussed later, this, in fact, was the chosen methodology of some late jurists who argued that regardless of what one might say about Ibn al-Zubayr's rebellion, for example, al-Ḥusayn b. ʻAlī's rebellion was justified. This gap or loophole, so to speak, is somewhat bridged by traditions that provide that one should not chide or attempt to counsel a ruler (*ʼamīr*) if the result could be the spread of *fitna*.[432] Pursuant to this logic, the prohibition against *fitna* is not limited to particular conflicts that took place in Islamic history, but extends to prohibit any situation that might result in a *fitna*. Likewise, it is not the Khawārij, as a specific historical entity, that are reprehensible, but any other group that follows in their footsteps. This is particularly the case considering that in early legal discourses, the word often used for rebels, in general, was the *khawārij* (those who exit or rebel).[433]

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[424] Al-Bukhārī, *Ṣaḥīḥ*, vol. 4, 221-233; Muslim, *al-Jāmi'*, vol. 8, 208, Abū Dāwūd, *Sunan*, vol. 4, 91-94, 96-99; al-Nasā'ī, *Sunan*, vol. 4, 92-93; al-Tirmidhī, *al-Jāmi'*, vol. 4, 422-425; Ibn Abī Shayba, *al-Muṣannaf*, vol. 8, 590-649; al-Rāzī, *'Ilal al-Ḥadīth*, vol. 2, 411, 413.

[425] For example, al-Shaybānī, *Kitāb al-Sunna*, 498, 500; al-Bukhārī, *Ṣaḥīḥ*, vol. 4, 230.

[426] Al-Bukhārī, *Ṣaḥīḥ*, vol. 4, 230; Ibn Abī Shayba, *al-Muṣannaf*, vol. 8, 594, 622, 625, 715.

[427] Al-Shaybānī, *Kitāb al-Sunna*, 424; Ibn Ḥanbal, *Musnad*, vol. 4, 482.

[428] Al-Shaybānī, *Kitāb al-Sunna*, 427.

[429] Al-Shaybānī, *Kitāb al-Sunna*, 419-447.

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[430] Al-Shaybānī, *Kitāb al-Sunna*, 424, 427, Bukhārī, *Ṣaḥīḥ*, vol. 4, 197; Ibn Manṣūr, *Sunan*, vol. 2, 322, 324; al-Dārimī, *Sunan*, vol. 2, 281; al-Bazzār, *al-Baḥr*, vol. 2, 187-190, 197.

[431] Al-Shaybānī, *Kitāb al-Sunna*, 460-1; al-Bazzār, *al-Baḥr*, vol. 2, 139.

[432] Ibn Abī Shayba, *al-Muṣannaf*, vol. 8, 622. These reports, however, provide that one may do so if the ruler commands a person to commit a sin or if one feels compelled to do so; but counseling the ruler should be done in private. On giving counsel to rulers in private, see al-Shaybānī, *Kitāb al-Sunna*, 507-509.

[433] See, for example, ʻAyīnī, *ʻUmdat al-Qārī*, vol. 24, 84, reporting the early opinion that every rebel was called a *khārijī* whether at the time of the companions or afterwards. The author then contrasts this to the position of the later jurists who distinguished between the *khawārij* and the *bughā*.

The Counter-Obedience Traditions

Al-Ḥākim al-Bayhaqī (d. 494/1100-1), the Mu'tazilī, accuses his opponents of having fabricated the traditions that demand that every usurper of power be obeyed, even if he is an Ethiopian slave, and whether he is just or not.[434] One suspects that he is quite right. Nevertheless, an accusation of fabrication was not the chosen methodology of the vast majority of Sunnī jurists. There are many Sunnī jurists who simply ignored the obedience reports. But even more jurists, as we will see, distinguished these reports on technical grounds. Very few jurists, however, declared the reports fabricated. There are a variety of reasons for this, among them the place that *ḥadīth* and *sunna* achieved in the early juridical culture. More importantly, the inherent conservatism of juridical culture does not usually opt for radical solutions such as declaring a whole body of precedent an invention or fabrication. I do not wish to imply that Sunnī jurists would have necessarily wanted to unequivocally and consistently negate the obedience traditions. In fact, these traditions served an important function when Muslim jurists wished to advocate order and stability. However, a unitary unwavering reliance on the obedience traditions would have rendered any discourse on rebellion impossible. Significantly, even if jurists would have wished to emphasize a unitary duty of obedience, they still would have had to distinguish or otherwise deal with the counter-traditions on obedience.

Perhaps the most important and compelling counter-tradition is the practice and conduct of many of the Prophet's companions and several of the early jurists who took part, supported or sympathized with a variety of rebellions. We have already discussed this specific heritage. To condemn unequivocally all forms of rebellion, in all circumstances, would raise serious questions as to the credibility of several of the most honored figures in early Islamic history. In fact, the opponents of rebellion, or the advocates of non-rebellion, focused most of their legal energy on distinguishing, limiting or explaining away the behavior of the early companions or jurists. If rebellion was going to be declared a sin, some argument had to be found for arguing that the honored forefathers did not commit a sin by rebelling. Even more, the conduct of some of the companions and jurists was bound to generate counter-traditions that would explain or legitimate their behavior. Again, the counter-traditions represent tendencies or trends in early legal opinions but are not developed systematic positions.

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[434] Al-Bayhaqī, *Risālat 'Iblīs*, 97. Likewise, al-Jāḥiẓ (d. 255/869), *al-Rasā'il al-Kalāmiyya*, 243-244, strongly criticizes those who claimed that slandering or cursing unjust rulers is a *fitna*. He asserts that these "innovating heretics" forbade the criticizing, maligning or removing of rulers regardless of their injustice.

Most counter-traditions appear in the same *ḥadīth* sources that cite the obedience traditions. It is very likely that both types of traditions appeared contemporaneously. The obedience and counter-obedience traditions manifest an unmistakable tension that never becomes fully resolved in the later writings of jurists. This tension is well-demonstrated, for example, in a tradition in which al-Ḥasan al-Baṣrī (d. 110/728) reportedly tells al-Ḥajjāj that the Prophet ordered that, "[We] respect and honor the rulers (*al-salāṭīn*) because they are God's pride and shadow on this earth if they are just." Al-Ḥajjāj, apparently surprised by this version of the tradition intimates that he had heared this tradition before, and declares: "[The *ḥadīth*] never said 'if they are just.'" Al-Ḥasan promptly answers, "Yes, it did." [435] In order to get a fuller sense of this tension, we will survey some of these counter-traditions in order to get a sense of the diversity and complexity extant in the sources of the time.

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[435] See al-Zamakhsharī, *Rabī' al-'Abrār*, vol. 5, 161. (The editor identifies the Ḥasan in the report as Ḥasan b. 'Alī who died in 49/669. This cannot be accurate). Many of the traditions that specify that no obedience is due to an unjust ruler or that a ruler should not be obeyed if he commands a sin, are cited in *Kitāb al-Majmū'*, attributed to Zayd b. 'Alī (d. 122/740), see 'Abbās b. 'Aḥmad b. Ibrāhīm al-Ḥasanī al-Yamanī al-Ṣan'ānī, *Tatimmat al-Rawḍ al-Naḍīr Sharḥ Majmū' al-Fiqh al-Kabīr*, printed with al-Ṣan'ānī, *al-Rawḍ al-Naḍīr Sharḥ Majmū' al-Fiqh al-Kabīr*, vol. 4, 6-11. Nonetheless, it is also very likely that many of the traditions that would have dogmatically supported rebellion against unjust rulers have disappeared or been destroyed. For example, al-Bayhaqī, *Risālat 'Iblīs*, 97, states that the Mu'tazila have narrated traditions in support of their position on rebellion. But it is not clear to which traditions the author is referring. Furthermore, as we noted earlier, several jurists were persecuted because of their positions on the legal effect of duress on acts. This means that various governments had an interest in suppressing certain types of traditions and literature. It would stand to reason that many of these traditions have in fact been suppressed or destroyed.

We have already mentioned the tradition which states that one must obey a ruler even if he is an Abyssinian or Ethiopian slave. Some versions of this same report add the contingency that such a person should only be obeyed as long as he implements the book of God, and, in some versions, as long as he leads Muslims in accordance with the book of God (*mā 'aqāma bikum kitābu Allāh* or *mā qādakum bi kitābi Allāh*).[436] Other reports make the duty of blind obedience applicable only in the time of the Prophet. Such reports quote the Prophet as saying: "Listen and obey as long as I am with you. After I die, take the book of God, [implement its commands] and make what it makes permissible, permissible, and prohibit what it prohibits."[437] A set of widely-cited traditions explicitly state that a ruler should not be obeyed if he commands a sin (*lā ṭāʿata fī maʿṣiya*) or that he should be obeyed only to the extent that he commands what is good and just (*'innamā al-ṭāʿatu fī al-maʿrūf*).[438] This general imperative was put into the form of an interesting narrative which was later heavily cited in juridical sources. According to this narrative, a man from the 'Anṣār was put in charge of a military expedition, and the Prophet commanded the soldiers under the man's charge to obey him. After leaving on their expedition, the soldiers upset the commander because of an unidentified reason. In reponse, the commander then ordered that a sizable fire be lit, and ordered his soldiers to throw themselves into the fire. When the soldiers hesitated, the commander said, "Didn't the Prophet command you to listen and to obey me?" The soldiers, however, remarked, "We have found refuge in the Prophet from Hellfire," and refused to obey. When the Prophet was told of the incident, he declared, "If they [the soldiers] would have obeyed and walked into the fire, they would have never come out [i.e. they would have burned in Hell forever]. Obedience is due only in what is good and just (*'innamā al-ṭṭā'tu fī al-ma'ruf*)."[439] Another version of this report insists that the whole matter started out as a joke. According to this version, the commander ordered the fire lit, and then said, "Don't you have a duty to obey me? The soldiers said, "Yes." The commander inquired, "So if I tell you to do anything you will do it?" The soldiers, again, said, "Yes." "Then," the commander asserted, "I order you to jump into the fire." But observing that the soldiers were about to comply with his order, the commander yelled out, "I was just joking with you." When the Prophet was informed of the incident, he said: "If someone orders you to commit a sin [i.e. kill yourselves in this situation], you should not obey."[440]

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[436] Al-Shaybānī, *Kitāb al-Sunna*, 492; Ibn Ḥanbal, *Musnad*, vol. 6, 451; Muslim, *al-Jāmiʿ al-Ṣaḥīḥ*, vol. 6, 15; Ibn Mājah, *Sunan*, vol. 2, 955. This is limited somewhat in a tradition in al-Bukhārī, *Ṣaḥīḥ*, vol. 4, 222. In this tradition, it is reported that the Prophet said that one should not rebel unless one sees clear acts of disbelief which one can identify as such by clear evidence (*ʿindakum min Allāh fīhi burhān*). Building on this, later Muslim jurists argued that one should not rebel as long as the acts of the ruler are legal according to some plausible legal interpretation. If they are not legal under any plausible interpretation, one may rebel. See al-Qasṭalānī, *'Irshād al-Sārī*, vol. 10, 170; al-Nawawī, *Sharḥ Muslim*, vol. 12, 468, 471.

[437] Ibn Ḥanbal, *Musnad*, vol. 2, 279.

[438] Abū Dāwūd, *Sunan*, vol. 4, 94; al-Bazzār, *al-Baḥr*, vol. 2, 204, 206; Muslim, *al-Jāmiʿ al-Ṣaḥīḥ*, vol. 6, 15; Ibn Mājah, *Sunan*, vol. 2, 956.

In another fascinating, but most certainly apocryphal, report, the tensions engendered in the counter-obedience traditions are fully and dramatically displayed. It is reported that 'Amrw b. al-'Āṣ, Mu'āwiya's supporter and governor, was sitting near the Ka'ba talking to a group of people about the Prophet and his times. Ibn al-'Āṣ explained that the companions, himself included, were traveling with the Prophet when they stopped to rest. The Prophet called the people to prayer but before they started praying, the Prophet spoke to the companions and explained that it is incumbent upon every prophet to warn his people about the good and evil that will eventually befall them. The Prophet warned that after he died, there would occur much chaos and many *fitan* until the heart of every Muslim would be gripped by terror. The Prophet then said, when this takes place, those who would like to escape Hellfire and enter Heaven, let them die; while believing in God and the Hereafter, let them treat others as they would want to be treated and let them not violate an oath of allegiance they gave to a ruler (*'imām*). The Prophet continued, "So, if one comes to challenge him [the *'imām*], then strike his neck [i.e. the challenger]." The man listening to the sermon took Ibn al-'Āṣ to the side and said, "By God, did you really hear the Prophet say this?" Ibn al-'Āṣ pointed to his ears and heart and said, " Verily, my ears have heard it and my heart has absorbed it." The man said, "But your cousin Mu'āwiya commands us to usurp each others' money and commands us to kill each other while God has said ... [Qur'ānic verse omitted]." Ibn al-'Āṣ fell silent for a while pondering the man's comment then said, "Then obey him [Mu'āwiya] in what is consistent with God's commands, and disobey him if he orders you to disobey God."[441] In this tradition, an obedience report is confronted and neutralized by a counter-obedience report. Ibn al-'Āṣ, Mu'āwiya's confidante and supporter, is made to admit that the commands of God come before all else, even before his master and benefactor, Mu'āwiya.

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[439] Muslim, *al-Jāmi' al-Ṣaḥīḥ*, vol. 6, 16. This version of the report is mentioned in the Zaydī source, al-Ṣan'ānī, *Tatimma*, vol. 4, 7.

[440] Ibn Mājah, *Sunan*, vol. 2, 956. Later jurists discuss this report, and other obedience and counter-obedience traditions. For example, Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī, *Faḍā'iḥ al-Bāṭiniyya*, ed. Nādī Faraj Darwīsh (Cairo: al-Maktab al-Thaqāfī, n.d.), 207; Ibn Taymiyya, *Majmū'*, vol. 35, 15.

A different genre of the counter-obedience reports may be called the empowering or enabling traditions. These traditions promote or encourage resistance to rulers in one form or another. A common form of this genre states that the best form of *jihād* (just struggle) is a word of truth spoken before an unjust ruler (*'inna min 'a'ẓami al-jihādi kalimatu 'adlin 'inda sulṭānin jā'ir*),[442] or that the Prophet commanded that Muslims speak the truth in whichever context, and not fear the consequences (*wa 'an naqūla al-ḥaqqa ḥaythumā kunnā lā nakhāfu fī Allāhi lawmata lā'im*).[443] Another form specifies that the Prophet said that whosoever resists an unjust ruler with his hand, tongue, or heart is a believer. If one fails to resist through one of these means, one is no longer a believer.[444] Other traditions assert that the Prophet warned that if Muslims fail to restrain the unjust (*al-ẓālim*), they will all be overcome by God's vengeance.[445] In a variety of reports, the Prophet is quoted as condemning or disavowing any Muslim who believes, supports or cooperates with unjust rulers.[446] Importantly, various reports add that the Prophet declared that whoever dies trying to protect his property from a usurper, dies a martyr.[447] Of course, a usurper of property could be an unjust ruler, a warring bandit, or even a rebel.

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[441] Muslim, *al-Jāmi' al-Ṣaḥīḥ*, vol. 6, 18.

[442] Al-Tirmidhī, *al-Jāmi' al-Ṣaḥīḥ*, vol. 4, 409.

[443] Ibn Mājah, *Sunan*, vol. 2, 957. Reports that demand that Muslims enjoin the good and forbid the evil (*al-'amr bi al-ma'rūf wa al-nahy 'an al-munkar*) should be included in the counter-obedience type of traditions. In many of these traditions, it is reported that the Prophet warned that if Muslims fail to enjoin the good and forbid the evil, they will suffer the fate of previous nations who have been damned by God for failing to discharge this duty. For these kinds of reports, see Ibn Ḥanbal, *Musnad*, vol. 5, 482, 485; al-Rāzī, *'Ilal al-Ḥadīth*, vol. 2, 411, 417, 430. On their face, it is not clear from these reports whether the

The range of raw materials incorporated into the juristic discourses on rebellion is not limited to the *ḥadīth* of the Prophet. Rather, various reports on specific historical events and incidents were incorporated as well. Because these traditions relate to particular historical contexts, they are more specific and technical in nature, but also ambiguous and vague in meaning. But this is exactly why they lent themselves well to the discourses on rebellion. In one set of traditions, the Prophet is quoted as saying that three types of people will die a pagan's death (*jāhiliyya*): 1. Those who depart from the *jamā'ā* and are not obedient; 2. Those who rebel, striking with their sword indiscriminately, not distinguishing between a believer and an unbeliever, and not upholding their promises or covenants; 3. Those who fight under a blind flag or blind tribalism (*'aṣabiyya*), or

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rulers, jurists or laity, or perhaps all of them, should shoulder the burden of enjoining the good and forbidding the evil.

[444] Al-Bazzār, *al-Baḥr*, vol. 5, 281.

[445] Al-Bazzār, *al-Baḥr*, vol. 1, 135; Ibn Ḥajar al-'Asqalānī, *Fatḥ al-Bārī*, vol. 14, 492. Of similar nature are reports that claim that the Prophet said: "As you are, you will be led," meaning that God permits people to be ruled according to their merits. If people are not diligent in upholding justice, they will be led by the unjust. Likewise, the Qur'ān says: "Thus, we make the unjust rule over each other because of what they [themselves] have earned." Qur'ān 6:129 This, of course, can be interpreted to mean that if people are led by unjust rulers, they should accept this situation because they deserve to be ruled as such. Alternatively, it could mean that they will continue to be ruled by the unjust unless they resist injustice. Both interpretations are cited by jurists in the context of the law of rebellion. See Ibn Taymiyya, *Majmū'*, vol. 35, 20.

[446] Al-Tirmidhī, *al-Jāmi' al-Ṣaḥīḥ*, vol. 4, 455.

[447] Al-Bazzār, *al-Baḥr*, vol. 4, 45; Ibn Mājah, *Sunan*, vol. 2, 861-2.

advocate blind tribalism.[448] The first category refers to rebels generally, and the second to the Khawārij specifically. The third category is the most interesting. It is general enough to be a blanket condemnation of any blind loyalty. This is significant, partly because some later jurists argued that the difference between a legitimate rebel and an illegitimate rebel is that the former rebels because of a *ta'wīl* (religious or political interpretation), and the latter rebels because of *'aṣabiyya* (some blind loyalty). More importantly, however, these traditions could be read as a condemnation of Mu'āwiya and the 'Umayyads. For example, Mālik b. 'Anas was reportedly asked about the *ahl al-'aṣabiyya alladhīna kānū bi'l-Shām* (the people of blind tribalism that were in Syria); he said that they should have been called to repent and then fought.[449] From this point of view, the above tradition would be read as upholding 'Alī's legitimacy against all who rose against him. The first group identified in the tradition would be 'Ā'isha and her party, the second group would be the Khawārij, and the third group would be Mu'āwiya and the Syrians. Considering that the Syrians eventually took power, the tradition would be derogatory of those who come to power through illegitimate means. In another related tradition, the Prophet reportedly warns that the downfall of his nation will be due to the fact that impetuous youth, in some versions, from Quraysh, will take power. The reports are constructed in such a fashion as to identify the 'Umayyads as the group meant by the tradition. Some reports claim that Abū Hurayra (d. 58/678), the Prophet's companion, knew the names of every one of these youth, but would only hint at their names without speaking frankly, in fear for his own safety. Other reports explicitly assert that the impetuous youth are Yazīd b. Mu'āwiya and al-Ḥajjāj.[450]

Other traditions arising from the context of 'Alī's conflict with his opponents, instead of being critical of unjust rulers, focus on the moral worth of the rebels or the treatment due to them. These traditions do not necessarily encourage or justify rebellion or challenges to power, but they do insist on a certain degree of tolerance to be afforded to rebels. We have already mentioned the traditions where 'Alī commanded that rebels not be pursued or slaughtered. Similar traditions state that in the Battle of Ṣiffīn, when 'Alī would capture a rebel, he would take his weapon and take an oath from him not to return to rebellion and then release him.[451] Importantly, there are a variety of reports asserting that 'Alī and 'Umar b. 'Abd al-'Azīz ordered that the rebels would not be attacked unless they initiated the violence.[452] When told that the Khawārij were slandering him, 'Umar b. 'Abd al-'Azīz reportedly told his governor that if he (the governor) wished to do so, he (the governor) could slander them back; but 'Umar b. 'Abd al-'Azīz refused to fight the Khawārij unless the Khawārij fought him ('Umar b. 'Abd al-'Azīz) first. Similarly, when told that the Khawārij were plotting to kill him, 'Alī said, "I cannot kill them and they have not killed me [yet]."[453] This is quite similar to a report in which a man was arrested and brought to 'Alī. 'Alī was told that the man had adopted the creed of the Khawārij. 'Alī asked: "What do you want me to do with him?" When it was suggested that the man be executed, 'Alī refused and said, " I do not kill someone who has not fought me." It was then suggested that the man be imprisoned. Again, 'Alī refused and proclaimed, "I do not imprison someone who has not committed a crime. Set the man free."[454] Furthermore, there are numerous reports in which 'Alī confirms that those who rebelled against him were to be considered Muslims and treated as such. When 'Alī was asked if the rebels in the Battle of the Camel were unbelievers, he said no. He was asked if they were hypocrites, and he said no because hypocrites rarely mention God. He was then asked, "So what are they?" He responded, "They are our brethrens, who have treated us unjustly."[455] The same exact tradition is reported about the Khawārij.[456]

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[448] Ibn Ḥanbal, *Musnad*, vol. 2, 390, 403, 646; Ibn Ḥajar al-'Asqalānī, *Fatḥ al-Bārī*, vol. 14, 530-1; al-Nawawī, *Sharḥ*, vol. 12, 480, 482.

[449] Saḥnūn, *al-Mudawanna*, vol. 1, 407.

[450] Al-Bukhārī, *Ṣaḥīḥ*, vol. 4, 222; al-Qasṭalānī, *'Irshād al-Sārī*, vol. 10, 170-171.

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[451] Ibn Abī Shayba, *al-Muṣannaf*, vol. 8, 724-5; also see Ibid., 710, 711, 718-9.

[452] Ibn Abī Shayba, *al-Muṣannaf*, vol. 8, 732.

[453] 'Abd al-Razzāq (d. 211/826), *al-Muṣannaf*, vol. 10, 117-118. Al-Bayhaqī, *Ma'rifat al-Sunan*, vol. 6, 286-7. These reports are widely cited by later jurists. For example, see Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol. 6, 93-94; Ibn Qudāma, *al-Mughnī*, vol. 10, 51-52. Mu'āwiya, reportedly, said, "I will not fight [the rebels] unless I find no other choice." 'Abd al-Razzāq, *al-Muṣannaf*, vol. 5, 462. However, as noted earlier, Sunnī jurists rarely cite or rely on reports about Mu'āwiya's conduct.

[454] 'Ibn 'Abd al-Barr, *al-Tamhīd*, vol. 23, 334.

We mentioned earlier that several reports claimed that the companions decided that no liability should be incurred for acts committed during the course of the rebellion. In other words, the contending parties would not be held liable for life and property destroyed during the course of fighting. According to a report attributed to Sa'īd b. al-Musayyib (d. 94/712-3), one of the prominent jurists of Medina, the reason for the exemption from liability is that, "each one of the two [contending] parties sees the other as unjust *(fa-kullu wāḥidatin min al-ṭā'ifatayni tarā al-'ukhrā bāghiya)*.[457] Later jurists explore the implications of this argument, and whether it means that each of the contending parties has a relative moral claim to power or whether it means that the subjective beliefs of each party must be taken into account. Put differently, this report could mean that the two parties contending for power only have a relative claim to power, and hence, if they fight it is not appropriate to hold one side liable for asserting its claim. Alternatively, the report could mean that although one party is in fact entitled to power, and is ultimately right, the other contending party has a sincerely-held subjective belief in the righteousness of its cause.

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[455] Ibn Abī Shayba, *al-Muṣannaf*, vol. 8, 707-8. In a different version 'Alī is reported to have said that Mu'āwiya and his party were not unbelievers. Rather, they claimed that, "We treated them unjustly, and we claimed that they treated us unjustly, and so, based on our claim, we fought them," see Abū al-Ḥasan 'Alī b. Muḥammad b. Ḥabīb al-Māwardī, *Naṣiḥat al-Mulūk*, ed. Muḥammad Jāsim al-Ḥayrathī (Baghdād: Dār al-Shu'ūn al-Thaqāfiyya al-'Āma, 1986), 462. 'Ammār b. Yāsir reportedly said that those who rebelled against 'Alī were to be considered believers, but that they had sinned and acted unjustly. Ibn Abī Shayba, *al-Muṣannaf*, vol. 8, 722. There are conflicting reports on whether dead rebels will go to hell or heaven. Ibn Abī Shayba, *al-Muṣannaf*, vol. 8, 725, 729.

[456] Ibn Abī Shayba, *al-Muṣannaf*, vol. 8, 743; Ibn 'Abd al-Barr, *al-Tamhīd*, vol. 23, 335-336. The same traditions are cited in the Shī'ī source, al-Najafī, *Jawāhir al-Kalām*, vol. 21, 338, however, this source says that those who rebelled against 'Alī are *kuffār ni'ma* (sinners or, literally, ungrateful to the blessings of God) but not *mushrikīn* (polytheists).

[457] 'Abd al-Razzāq, *al-Muṣannaf*, vol. 10, 122. This could also be read to mean that each side sees the other as a rebel. Nonetheless, by Ibn al-Musayyib's time, the word *bāghiya* did not yet acquire its technical meaning of "rebel." Rather, it was used in a general sense to mean unjust. On Ibn al-Musayyib, see Ibn al-Jawzī, *Ṣifat al-Ṣafwa*, vol. 2, 437-440.

Because of this sincerely-held subjective belief, even if the belief is ultimately erroneous, it would not be proper to hold either party liable.

This debate relies heavily on another report which comes by the way of Ibn al-Musayyib's student, al-Zuhrī (d. 124/741). The 'Umayyad Sulaymān b. Hishām reportedly wrote to al-Zuhrī asking about a woman who left her husband and joined the Khawārij (Ḥarūriyya). She joined the Khawārij in their activities and re-married from amongst them, but later repented and wanted to re-join her family. Al-Zuhrī wrote back saying:

> "The first *fitna* broke out while many of the companions of the Prophet who fought in [the battle of] Badr were still alive. They all agreed not to penalize anyone who married (or had intercourse) while relying on an interpretation from the Qur'ān (*bi ta'wīli al-Qur'ān*), not to punish anyone who killed while relying on an interpretation from the Qur'ān, and not to hold anyone liable who destroyed property while relying on an interpretation from the Qur'ān. The only exception was that if the usurped property is found in the possession of the usurper, it must be returned. In my view, the woman should be permitted to return to her [first] husband, and anyone who may have slandered her should be punished."[458]

Effectively, what al-Zuhrī is saying is that the woman's sincerely-held belief that it was proper to join the Khawārij exempts her from liability.[459] Interestingly, Sulaymān b. Hāshim, although the son of the former 'Umayyad caliph 'Abd al-Malik, at one point had, himself, joined the Khawārij and fought against the last 'Umayyad caliph.[460] Al-Zuhrī's father, as we mentioned earlier, had joined Ibn al-Zubayr's rebellion, but al-Zuhrī, himself, reconciled with the 'Umayyads and cooperated with the caliph 'Abd al-Malik. This could mean that the whole interaction between Sulaymān and al-Zuhrī is apocryphal.[461] Even if it is apocryphal, this would be largely irrelevant. What is significant is that later Muslim jurists rely heavily on this, and the other reports discussed above, in arguing the law of rebellion in Islam.[462] Importantly, by extending the rule of exemption from liability to the Khawārij, this report represents a significant trend which was later endorsed by many jurists. As discussed later, the status of the Khawārij has remained problematic throughout Islamic history because of the group's extremist views, and its bloody methods. If the Khawārij are not to be held liable then, by extension, any other less extreme group would be excused from liability as well. In another report, dealing with the Khawārij, this one attributed directly to 'Alī, it is claimed that 'Alī said that if the Khawārij rebel against a just ruler then Muslims should fight them. However, if the Khawārij rebel against an unjust ruler, Muslims should not fight them because in this situation, they may have a legitimate cause of action *(fa lā tuqātilūhum fa 'inna lahum maqālan)*.[463] Arguably, the reasoning of this report could be extended to less extreme rebels who might rebel against an unjust ruler.

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[458] 'Abd al-Razzāq, *al-Muṣannaf*, vol. 10, 120-1; 'Ayīnī, *al-Bināya*, vol. 6, 747-8; 'Alā' al-Dīn Muḥammad al-Samarqandī, *Tuḥfat al-Fuquhā'* (Beirut: Dār al-Kutub al-'Ilmiyya, 1984), vol. 3, 314; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol. 6, 100.

[459] The reference to slander (*qadhf*) is necessary due to the fact that the woman married a second husband. When the woman joined the Khawārij, according to her newly adopted religious creed, most Muslims, including her first husband, would be considered unbelievers. Accordingly, she thought that her first marriage was automatically dissolved, and that she was free to re-marry. In the opinion of her detractors, she would be considered an adulteress because she wrongly believed that her first marriage was dissolved. In effect, al-Zuhrī is saying that anyone who accuses the woman of adultery should be punished because she acted on good faith while basing herself on a religious interpretation.

[460] See Kennedy, *The Prophet*, 112-115.

Certainly, I am not contending that any of the reports mentioned above, of necessity, encourage or support rebellion. Rather, they are susceptible of being interpreted or constructed in such a way that they would render a supposed duty of unquestioning obedience problematic. I have chosen the reports that figure prominently in later discourses on rebellion. If I am correct in asserting that these reports came into circulation in the first half of the second century or earlier, then they were part of the raw material which was used to construct the discourses on rebellion. Of course, it is very likely that early trends and attitudes towards rebellion generated many of these reports in the first place. I am also not discounting entirely the possibility that the Prophet or ʻAlī, in one form or another, were the originators of some of these reports. It is quite possible that the Prophet made statements on the need to obey God even if it meant disobeying others. Similarly, it is possible that ʻAlī refused to declare his political opponents unbelievers or shed their blood without limitations. It is also possible that the collective memory of Muslims recalled some exhortations from the Prophet or ʻAlī on the issue of authority, obedience and rebellion, which the traditionists later articulated in the form of canonical *ḥadīth* traditions. But even in their canonical form, without the development and systematization of jurists, these traditions, despite their highly-structured and formal constructs, are susceptible to an endless array of interpretive and reconstructive activity. Relying on the traditions from ʻAlī about rebellion, for example, one may argue that ʻAlī was the just ruler, and that the 'Umayyads were illegitimate usurpers. Alternatively, one may argue that the 'Umayyads were the just rulers, and all those who rebelled against them were illegitimate usurpers. In either case, one could still argue that rebellion is not a sin as long as the rebellion relies on a plausible religious interpretation. One can also argue that rebellion is never justified but then argue that it is legal to defend oneself against acts of injustice. Hence, one can construct an argument that rebellion is illegal unless it is an act of self-defense.

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[461] While it is true that Zuhrī cooperated with the 'Umayyads, he might have actually made this statement towards the end of the 'Umayyad dynasty. Around 121AH, and especially 123AH when the Caliph Hishām died, the deterioration in the empire had become evident. There was widespread disappointment and frustration. It would not be surprising if Zuhrī made the above discussed statement at that time.

[462] For example, Ibn Ḥajar al-'Asqalānī, *Fatḥ al-Bārī*, vol. 14, 312, argues that every rebel with a plausible interpretation (*ta'wīl sā'igh fī lisān al-'arab*) does not incur a sin. In a version of this report, that probably came into circulation later than the above discussed version, it is the caliph Hishām b. 'Abd al-Malik who asked al-Zuhrī about the woman. Al-Zuharī's response was the same, see al-Qāḍī Abū Ya'lā, *al-Masā'il al-Fiqhiyya min Kitāb al-Riwāyatayn wa al-Wajhayn*, ed. 'Abd al-Karīm b. Muḥammad al-Laḥḥām (Cairo: Maktabat al-Ma'ārif, n.d.), vol. 2, 306-7; al-Nawawī, *al-Majmū'*, vol. 19, 210.

[463] Ibn Abī Shayba, *al-Muṣannaf*, vol. 8, 737-738, also adds that 'Alī said not to curse the Khawārij. Also see this report in Shī'ī sources, al-'Āmilī, *Wasā'il*, vol. 11, 60; al-Najafī, *Jawāhir al-Kalām*, vol. 21, 333. As discussed later, Muslim jurists built on this tradition. For example, see Ibn Ḥajar al-'Asqalānī, *Fatḥ al-Bārī*, vol. 14, 309, who after citing this tradition argues that people should not fight those who rebel against an unjust ruler. Even in his book written for the specific purpose of giving advice to rulers, al-Māwārdī quotes a version of this report; al-Māwardī, *Naṣīḥat al-Mulūk*, 462.

Even the traditions that provide that a ruler should be obeyed only to the extent that he implements the Qur'ān are inherently vague, and can only be given substance within the context of a political, social or jurisprudential discourse. The rallying call that judgment should be in accordance with the Qur'ān and the command of God, was common among the rebels of early Islam.[464] Yet the inherent vagueness of such a call is well-demonstrated in an anecdote cited by Muslim jurists. The Qurrā' (eventually called the Khawārij) broke with 'Alī and left to Ḥarūrā' because they accused him of having abandoned the law of the Qur'ān when he accepted the possibility of a peaceful settlement with Mu'āwiya. The Khawārij, who were quite pious but legally unsophisticated, would yell at 'Alī, "You have made human beings the supreme judges (sovereigns) over God's religion while God should be the Supreme judge (the Sovereign)." 'Alī, frustrated by the polemics, brought a huge Qur'ān and called upon Muslims to gather. He then poked at the Qur'ān with his finger and said: "Oh, Qur'ān speak to the people." The people exclaimed, "What are you asking for? Is it a human being so that it would be able to speak? It is but ink and paper, and we (human beings) speak in accordance with what we recite (understand) from it (*'innmā huwwa midādun wa waraq wa naḥnu natakallamu bi mā rawaynā minhu*). 'Alī then said: "[In this fashion] the book of God judges between me and those people (the Qurrā')." 'Alī goes on to explain that based on an analogy drawn from Qur'ānic injunctions regarding a marital dispute, and on an analogy drawn from the conduct of the Prophet, his interpretation as to how he should conduct himself with Mu'āwiya is well-supported.[465] Muslim jurists do not cite this example only to demonstrate that 'Alī was more reasonable and knowledgeable than the Khawārij, but also to explore the range of possible legitimate disagreements that might distinguish a rebel from a non-rebel or distinguish one rebel from another. This example is also relevant to the larger context of ascertaining the proper balance between politics and legality. While Muslim jurists were not willing to argue that all matters that pertain to law are susceptible of only one correct interpretation, they were also not willing to dogmatically champion the cause of politics.[466]

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[464] Crone and Hinds, *God's Caliph*, 58-96, demonstrate that a vague call to the judgment of the Qur'ān and Sunna was common among many rebels in early Islam. The call to rule or judge according to the book of God had, and still has, a strong emotive appeal. For example, Ibn Ḥazm cites a very interesting incident in which a man agreed to give an oath of allegiance to Mu'āwiya on the condition that he (Mu'āwiya) comply with the Qur'ān and the Sunna of the Prophet. Mu'āwiya rejected the qualifying condition, and so the man refused to give him the oath of allegiance, in Abū Muḥammad 'Alī b. Sa'īd b. Ḥazm, *Jamharat Ansāb al-'Arab*, ed. E. Levi-Provençal (Cairo: Dār al-Ma'ārif, 1948), 401; also see Crone and Hinds, *God's Caliph*, 67 n. 59.

[465] Ibn Ḥajar al-'Asqalānī, *Fatḥ al-Bārī*, vol. 14, 303; al-Shawkānī, *Nayl al-'Awṭār*, vol. 7, 166. Another report makes 'Alī side-step the issue of who is right or wrong and rely instead on a technicality. A man came to 'Alī and asked," Why do you fight [your opponents] (*'alā ma tuqātil hā'ūlā'*)." 'Alī responded, " [I fight them] over what is right (*'alā al-ḥaqq*)." The man said, "But [your opponents] say, they are right." 'Alī responded, "then I fight them because they violated their oath of allegiance and broke with the *jamā'a*," al-Qasṭalānī, *'Irshād al-Sārī*, vol. 10, 196. In a report that perhaps reflects an extreme sense of skepticism, it is claimed that Jubayr b. Nafīr (d. 70/689 or 80/699) asked some people around him: "If two persons emerge, one calling for the book of God (*kitāb Allāh*) [to be implemented], and the other calling for the discretion of the ruler (*sulṭān Allāh*) which one would you follow?" The people said: "We would follow the one calling for the book of God." Ibn al-Jubayr said: "Then you will be doomed (*'idhan*

Both the obedience and counter-obedience traditions do not yield any inevitabilities; they merely set trends. The various trends were constructed and reconciled in a fashion that would ultimately make the jurists the ultimate arbiters not only of law and order, but also of the legality of rebellion. At this point, it is useful to give a demonstrative example of this process of reconciling and reconstructing the traditions on obedience. The implication of this example is that the jurists, and not the rulers, are the ones empowered to decide on what is to be considered a legitimate or illegitimate rebellion. The jurist Ibn Qayyim, for instance, citing the obedience traditions, concedes that rulers must be obeyed without question, but he also asserts that rulers may only be obeyed if they command that which is good and just (*ma'rūf*). The tension between the two imperatives is resolved in the following fashion:

> "Properly speaking, the rulers (*al-'umarā'*) are obeyed [only to the extent] that their commands are consistent with the [articulations] of the religious sciences (*al-'ilm*). Hence, the duty to obey them (the rulers) derives from the duty to obey the jurists (*fa ṭā'atuhum taba' li ṭā'ati al-'ulamā'*). [This is because] obedience is due only in what is good (*ma'rūf*), and what is required by the religious sciences (*wa mā 'awjabahu al-'ilm*). Since the duty to obey the jurists is derived from the duty to obey the Prophet, then the duty to obey the rulers is derived from the duty to obey

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tahlakū)," al-Rāzī, *'Ilal al-Ḥadīth*, vol. 2, 424-5. Jubayr was a Syrian jurist. Reportedly, he was threatened by Mu'āwiya because he narrated a tradition in which the Prophet predicts and laments that after he dies, his nation will abandon the Qur'ān, al-Dhahabī, *Siyar*, vol. 4, 77.

[466] For an extreme example, Ibn al-Jawzī claims that 'Aḍuḍ al-Dawla the Buwayhid (r. 338/949 - 372/983) was madly in love with a slave girl to the point that she distracted him from administering the affairs of the state. Therefore, 'Aḍuḍ al-Dawla had the woman drowned so that he would no longer be distracted. Ibn al-Jawzī comments that this is "absolute madness," and that under no possible interpretation can this be considered legal. No claim of public interest can justify the taking of innocent life. Ibn al-Jawzī, *Talbīs 'Iblīs*, 186. Also see, Idem, *al-Shifā' fī Mawā'iẓ al-Mulūk wa al-Khulafā'*, ed. Fu'ād 'Abd al-Mun'im 'Aḥmad (Alexandria: Dār al-Da'wa, n.d.), 55-57.

> the jurists [who are the experts on the religious sciences]. Furthermore, since Islam is protected and upheld by the rulers and the jurists alike, this means that the laity must follow [and obey] these two [i.e. the rulers and jurists.]"[467]

If one carefully examines this argument, one finds that Ibn Qayyim took parts from the obedience and counter-obedience traditions and re-formulated the traditions into an entirely new construct. He is arguing that the duty to obey the ruler is derivative of the duty to obey jurists, and the duty to obey the jurists is a derivative of the duty to obey the Prophet. Therefore, the jurists are obeyed to the extent that they obey the Prophet, and the rulers are obeyed to the extent that they obey the jurists. Although the last sentence of the quote gives the impression that rulers and jurists must be equally obeyed by the laity, this impression is superficial. Rulers are to be obeyed if their commands are consistent with the commands of religion, and it is the jurists who study and interpret the commands of religion. Consequently, in the final analysis, it is the jurists that must be obeyed. The traditions on obedience and counter-obedience have been reconstructed in this argument into something entirely different -- these traditions now favor the Prophet, then the jurists, then the rulers.[468] A similar process of innovative reconstruction was carried out in the juristic discourses on rebellion with the end result being that the jurists would become the final arbiters of the standards by which a rebellion is measured and treated.

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[467] Ibn Qayyim, *'A'lām*, vol. 1, 10. Of course, there is vast literature on the creative art of reconciling seemingly contradictory *ḥadīth*. Among the better-known works are: Abū Ja'far 'Aḥmad b. Muḥammad b. Salāma al-Ṭaḥāwī, *Sharḥ Mushkil al-Ḥadīth*, ed. Shu'ayb al-'Arna'ūṭ, 16 vols. (Beirut: Mu'assasat al-Risāla, 1994); al-Shāfi'ī, *'Ikhtilāf al-Ḥadīth*, printed in the margins of vol. 7 of *al-'Umm* (Cairo: Maṭba'at Būlāq, 1325 AH); Abū Muḥammad 'Abd Allāh b. Muslim b. Qutayba, *Ta'wīl Mukhtalaf al-Ḥadīth* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, n.d.).

[468] Al-Ghazālī, *Faḍā'iḥ al-Bāṭiniyya*, 193-194, 206-207, makes a similar argument to Ibn Qayyim's. The idea that rulers should consult jurists or that they should not decide anything without the advice of jurists is a common theme in juridical writings. For example, see Ibn al-Jawzī, *al-Shifā'*, 55. In fact, as discussed later, some jurists argued that a ruler should not decide the fate of rebels or bandits without consulting the jurists first.

The Discourse of Reports on Rebellion and Banditry

In historical practice, as we saw, rebels were often addressed or treated as bandits. The early traditions did not clearly distinguish between rebellion and banditry either. The two categories of *bāghī* and *muḥārib* were not separate and distinct, and many early reports lapsed or confused the two. There were, however, two trends: the first, reflected in the reports above, tended to emphasize amnesty and exemption from liability for rebels, and the second, tended to invoke the language and symbolism of the *ḥirāba* verse in the context of addressing rebellion. As noted earlier, in the developed juristic discourses, *ḥiraba* became the crime of highway robbery or banditry, and this crime was clearly distinguished from rebellion. However, the early reports did not reflect this distinctive clarity. Many early reports equated between *ḥirāba* and the act of waging war against Muslims after having become an apostate. In this context, *ḥirāba* involved the formal renunciation of Islam, and the waging of warfare against Muslims. Other reports did not assume a formal act of apostasy. Rather, these reports referred to general acts of lawlessness in which life and property were destroyed. However, these acts of lawlessness could be committed during the course of a rebellion. This effectively meant that *ḥirāba* would be indistinguishable from rebellion.

Many of the early reports on *ḥirāba* are extremely vague. For example, it is reported that Sa'īd b. Jubayr said: "Whoever wages war is a *muḥārib* (*manḥārab fahuwa muḥārib*). If he destroys a life, he should be killed. If he destroys life and property, he should be crucified because crucifixion is harsher. If he destroys property without destroying life, he should be amputated from opposite ends."[469] The statement "whoever wages war is a *muḥārib*" is very broad, and could possibly apply to a variety of acts and categories of people. It could apply to an apostate, bandit, rebel or anyone else who uses armed force against society. It should be recalled that Sa'īd b. Jubayr was reportedly executed by al-Ḥajjāj for taking part in the rebellion by al-'Ash'ath.[470] If, in fact, Ibn Jubayr is the source of this report, it would be unlikely that he would say that anyone who wages war against a ruler is to be considered a *muḥārib.* Yet, it would be advantageous to the 'Umayyads to attribute a report to Ibn Jubayr in which the clear implication is that whoever wages war against a ruler is to be killed, crucified or amputated.[471]

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[469] Ibn Abī Shayba, *al-Muṣannaf*, vol. 6, 589, vol. 7, 603; 'Abd al-Razzāq, *al-Muṣannaf*, vol. 10, 108-109.

Other reports, not attributed to Ibn Jubayr, simply state that *ḥirāba* is *shirk* (disbelief or not believing in God),[472] or state that the *muḥārib* is one who fights religion (*al-muḥārib man ḥāraba al-dīn*). Fighting religion is then equated with spreading corruption on the earth.[473] These expressions could have a variety of meanings. They could mean that *ḥirāba* only applies to apostates who abandon Islam and then declare war on society, or they could mean that for anyone who rebels against the ruler, even if he claims to be a Muslim, it is as if he has waged war against religion.[474] Several reports refer to the 'Urayna incident, and give the clear impression that *ḥirāba* refers to an act of apostasy coupled with warfare.[475] However, other reports address *ḥirāba* as a crime involving *qaṭ' al-ṭarīq,* which literally means to obstruct the road or prevent passage, but usually refers to highway robbery.[476] Nonetheless, this does not necessarily add clarity to the problem. Rebellious groups such as the Khawārij would regularly attack caravans and obstruct passage. In some reports, for example, instructions are given not to attack the Khawārij unless they obstruct passage and terrorize the wayfarer.[477] More precise reports assert that *ḥirāba* involves a thief who commits highway robbery, i.e. a bandit.[478]

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[470] For a dramatic description of his execution, see Ibn al-Jawzī, *Ṣifa*, vol. 3, 54-58.

[471] Substantially the same report is attributed to al-Ḥasan. He reportedly said, "*man ḥārabafahuwa muḥārib*," 'Abd al-Razzāq, *al-Muṣannaf*, vol. 10, 111. The statement is no less ambiguous than that attributed to Ibn Jubayr.

[472] Ibn Abī Shayba, *al-Muṣannaf*, vol. 7, 605; 'Abd al-Razzāq, *al-Muṣannaf*, vol. 10, 106; Abū Dāwūd, *Sunan*, vol. 4, 130.

[473] Ibn Abī Shayba, *al-Muṣannaf*, vol. 7, 605; 'Abd al-Razzāq, *al-Muṣannaf*, vol. 10, 111-112.

[474] As Crone and Hinds in *God's Caliph* have demonstrated, 'Umayyad and early 'Abbāsid caliphs often thought of themselves as God's representative and shadow on the earth.

[475] 'Abd al-Razzāq, *al-Muṣannaf*, vol. 10, 106-107.

[476] Ibn Abī Shayba, *al-Muṣannaf*, vol. 7, 602; 'Abd al-Razzāq, *al-Muṣannaf*, vol. 10, 106.

Books of *ḥadīth* reflect the ambiguity that surrounded the early discourses on *baghy* and *ḥirāba*. As Ibn Taymiyya noted, they do not contain a chapter on fighting the *bughā*. Frequently, there is a chapter entitled fighting the Khawārij which often contains a mixture of, at times, contradictory reports on the early history of the Khawārij, and on 'Alī's conduct with them. The segment entitled fighting the *muḥāribūn* usually contains the reports on the 'Urayna incident without further elaboration. Al-Bukhārī does have a section subtitled, "What has been reported regarding those who have an interpretation (*mā jā'a fī al-muta'awwilīn*)." Importantly, however, the only reports mentioned under the section pertain to an incident regarding the different readings of the Qur'ān, and incidents during the life of the Prophet and the hypocrites of Medina. But there is no mention of the *bughā*.[479] The organizational structure for these various topics is rather interesting. Reports about the apostates, the heretics (*zanādiqa*), those who break with the *jamā'a*, the *muḥaribūn*, those who cause corruption on the earth, and the Khawārij follow each other in a flood of traditions. If one would speculate about a general organizational heading under which all these topics are subsumed, it would be "the trouble makers."[480]

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[477] Ibn Ḥajar al-'Asqalānī, *Fatḥ al-Bārī*, vol. 14, 306; Ibn Abī Shayba, *al-Muṣannaf*, vol. 8, 736; 'Abd al-Razzāq, *al-Muṣannaf*, vol. 10, 117.

[478] 'Abd al-Razzāq, *al-Muṣannaf*, vol. 10, 106.

[479] Al-Bukhārī, *Ṣaḥīḥ*, vol. 4, 198-199. Al-'Ash'arī, *Maqālāt*, vol. 2, 171, has a section on the various views regarding whether the *muta'awilūn* (those with a religious interpretation) are considered unbelievers. He mentions the views of the Mu'tazila, Murji'a and Khawārij. His treatment reflects the controversies of the sectarian debates about the Islamicity of the various sects of theology. But it is very different from the treatment of the topic in legal discourses.

[480] For example, al-Bukhārī, *Ṣaḥīḥ*, vol. 4, 195-199; al-Nasā'ī, *Sunan*, vol. 4, 90-128 (who adds the magicians to the fold); Abū Dāwūd, *Sunan*, vol. 4, 124-129 (who also lists apostasy and *ḥirāba* under *ḥudūd*); al-Tirmidhī, *al-Jāmi'*, vol. 4, 48-50 (places apostasy, *ḥirāba*, and magic under *ḥudūd*).

One, of course, should not read too much into the organizational structures of books of *ḥadīth*. The essential point, however, is the lack of clarity as to the concepts or categorizations that surrounded the issue of rebellion in the first two centuries of Islam. Abū al-Ḥasan al-'Ash'arī (d. 330/941), for example, reporting on the early views on *baghy* and *bughā*, reflects much of this ambiguity. According to the views that al-'Ash'arī describes, these terms are used to apply to government or rebel forces, and are used in such a way as to be the functional equivalent of the word "opponent." For instance, the author reports that the Khawārij argued that 'Alī had become an unbeliever when he neglected to fight the *bughā*.[481] *Bughā* in this context means Mu'āwiya and those who rebelled against 'Alī. Al-'Ash'arī then reports that various groups disagreed on whether the *bughā* may be assassinated or killed by stealth (*'ikhtalafū fī qatl al-bughā ghīlatan*). He states that some of the Mu'tazila, Khawārij and extreme Shī'īs believed that it is permissible to assassinate opponents.[482] Here, the word *bughā* means political opponents or government officials (probably the 'Umayyads or 'Abbāsids). Later the author discusses the early views on whether one may conduct commercial transactions with *al-qāṭi' al-bāghī* (*wa 'ikhtalafa al-nāsu fī mubāya'ati al-qāṭi' al-bāghī*). As explained earlier, *al-qāṭi'* means someone who obstructs the wayfarer or a highway robber; *al-bāghī* means a rebel or unjust person. Using the two terms together could mean a rebellious bandit or a bandit who is a rebel. Importantly, however, al-'Ash'arī says that a group of people said that one should not buy or sell from such a person unless he abandons the *fitna*.[483] In this context, it is likely that al-'Ash'arī is using the word to refer to those who attack caravans and commit highway robbery. This could be any common highway robber or rebel who commits highway robbery. Most likely, however, it refers to the Khawārij. Therefore, we find that the word *baghy* has been used, all in one text, to refer to rebels, the state and its officials, and to the rebellious group, the Khawārij. This lack of precision in the use of the terminology reflects the fact that legal discourses, at that particular time, had not yet fully co-opted terms and rendered them into technical terms of art. In fact, the full co-optation of the terms does not take place until well after the 4th/10th century, and in a few sources, the lapsing and confusing of *hirāba* with *baghy* continues up to the 9th/15th century.

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[481] Al-'Ash'arī, *Maqālāt*, vol. 2, 141.

[482] Ibid., vol. 2, 157.

[483] Ibid., vol. 2, 159-160.

The Early Juristic Discourses and al-Shāfiʻī

Early juristic discourses on rebellion are vague and largely unsystematic. At the same time, one cannot claim that these juristic discourses are dogmatic or of a unilateral nature. The complexity found in the traditions discussed above are fully reflected in the early juristic discourses on the topics of rebellion and banditry. The early juristic culture was searching for concepts that would distinguish the treatment of rebels from other elements who violated the law, but that culture was not sufficiently developed as to be able to do so with systematic precision.[484]

The *Muwaṭṭa'* of Mālik b. 'Anas (d. 179/795) does not cover the subjects of *baghy* or *ḥirāba*. There is a report mentioned in the *Muwaṭṭa'* that Saʻīd b. al-Musayyib reported that the caliph ʻUmar b. al-Khaṭṭāb executed six or seven men who killed someone through *ghīla*. As noted earlier, *ghīla* is to kill someone by deception or stealth which, in some situations, could be an assassination. Organizationally, this tradition is placed right before a report on executing someone who uses magic and casts spells.[485] In another narrated version of the *Muwaṭṭa'*, it is reported that Mālik ruled that a man who kills another through *ghīla*, without anger or spite, *must* be killed, and the family of the victim, even if it wishes to do so, does not have the right to pardon the offender.[486] Effectively, murder through *ghīla* is considered an aggravated crime which necessitates that the offender be executed, and that the options of blood money or pardon not be allowed.[487]

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[484] On the development and processes of early Islamic jurisprudence, see 'Aḥmad Hasan, *The Early Development of Islamic Jurisprudence* (Islamabad: Islamic Research Institute, 1982); Muhammad Yusuf Guraya, *Origins of Islamic Jurisprudence* (Delhi: Noor Publishing House, 1992); George Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh: Edinburgh University Press, 1981), esp. 1-34; Melchert, *The Formation*, 1-47; Wael Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1997), 1-35; Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950); Norman Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Clarendon Press, 1993). Although I cite Schacht and Calder, I note that I disagree with their methodology and conclusions. See, on Calder, John Burton, "Rewriting the Timetable of Early Islam," *Journal of the American Oriental Society* 115 (1995): 453-62.

Various positions are attributed to Mālik b. 'Anas by the Mālikī jurists 'Ibn al-Qāsim (d. 191/806-807), Ḥammad b. Isḥāq (d. 267/880-881), his brother Ismā'īl (d. 282/896), and Saḥnūn (d. 240/854). It is difficult to ascertain whether, in fact, Mālik held any of the views attributed to him. Importantly, however, the various reports, whether attributed to Mālik directly or to one of his students, represent trends in early Mālikī jurisprudence. According to Saḥnūn and 'Ibn al-Qāsim, Mālik held the view that the Khawārij and Qadariyya should be asked to repent, and if they refused to do so, should be killed.[488] When asked if his view was the same for all such heretics (*ahl al-'ahwā'* or *ahl al-bida'*), Mālik reportedly said, yes.[489] This would presumably mean that the Shī'a, Mu'tazila and other groups would also be asked to repent or be killed.[490] But beyond this basic position attributed to Mālik, the consistency of the reports end. Saḥnūn reports that

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[485] Abū 'Abd Allāh Mālik b. Anas, *al-Muwaṭṭa'*, narrated by Yaḥyā b. Yaḥyā al-Laythī (d. 234/849) (Beirut: Dār al-Kutub al-'Ilmiyya, n.d.), 487.

[486] Mālik b. 'Anas, *al-Muwaṭṭa'*, narrated by Abū Muṣ'ab al-Zuhrī (d. 242/857), 248.

[487] Al-Ṭabarī (d. 310/922), *Jāmi'*, vol. 5, 136, reports that Mālik adopted the view that *qatl al-ghīla* (murder through *ghīla*) is a form of *ḥirāba*. According to al-Ṭabarī, this means that if an offender tricks or deceives someone into entering into a private or secluded area and then kills him or her, they have committed the crime of *ḥirāba*. One, however, should be skeptical of views attributed by later jurists to the early masters such as Mālik. It is likely that a view would be adopted or advocated by one of the students of Mālik or Abū Ḥanīfa, but then be recalled as the master's position.

[488] Saḥnūn, *al-Mudawwana*, vol. 1, 407.

[489] Saḥnūn, *al-Mudawwana*, vol. 1, 407; Ibn 'Abd al-Barr, *al-Tamhīd*, vol. 4, 238.

[490] As mentioned earlier, Mālik was also asked about the followers of blind tribalism in Syria (*ahl al-'aṣabiyya al-ladhīna kānū bi'l Shām*). He said they should be asked to repent, or they should be fought. Saḥnūn, *al-Mudawwana*, vol. 1, 407.

Ibn al-Qāsim said that Mālik asserted that the above mentioned so-called heretical groups should be asked to repent or be killed only if the ruler (*'imām*) is just. This also means, Saḥnūn argues, that if these groups rebel against a just ruler, they are to be fought and asked to repent.[491] No indication is given as to what should take place if the ruler is not considered just. Beyond the issue of the quality of the ruler, the treatment that is supposed to be afforded to the Khawārij and other groups is quite puzzling. According to Ibn al-Qāsim, Mālik argued that because the Khawārij rely on a religious interpretation (*ta'wīl*), they are not to be held responsible for life or property destroyed. When Saḥnūn inquired of Ibn al-Qāsim about the difference between the *muḥāribūn* and the Khawārij, Ibn al-Qāsim explained that there is a material difference between the two. The *muḥāribūn* violate the law because they are corrupt and sinful, and because they are motivated by prurient interests. On the other hand, the Khawārij fight over a religious interpretation that they believe to be correct (*qātalū 'alā dīnin yarawna 'annahu al-ṣawāb*). Therefore, if the Khawārij repent, they are not to be held liable for life or property that they may have destroyed. However, if property that they may have usurped is in their possession, this property may be retrieved from them. If the *muḥāribūn* repent and surrender before they are seized by the ruler, they are pardoned as far as the rights of the *'imām* (*haqq al-'imām*) are concerned, but they are not forgiven as far as the rights of people (*ḥuqūq al-nāss*) are concerned.[492] At this point, Saḥnūn does not explain what any of this means. The implication, however, is that there is a material difference between those who commit violence because of a religious motivation and those who commit violence because of a desire for private gain. Those who commit violence because of religious motivations are not held liable for life and property destroyed. Those who commit violence because of prurient interests are not forgiven for life and property destroyed. If they repent and surrender before being seized by the ruler only the punishments of God are forgiven but the liability for acts committed against private individuals is not negated.

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[491] Saḥnūn, *al-Mudawwana*, vol. 1, 407.

[492] Saḥnūn, *al-Mudawwana*, vol. 1, 407. This means that the *ḥudūd* (the punishments specified in the Qur'ān -- execution, crucifixion and amputation) would not be applied to them. But victims of the crime would still have the right to demand exaction for the violation of their rights. Saḥnūn, *al-Mudawwana*, vol. 4, 430.

According to Ibn al-Qāsim, Mālik gives the ruler considerable amount of discretion in dealing with bandits who are motivated by prurient interests. If they terrorize the wayfarer, without usurping property or slaughtering people, the ruler may choose to kill, crucify or amputate them.[493] Mālik recommended that if bandits are captured before having the opportunity to terrorize or commit any other crime, they are to be whipped and placed in prison until they repent.[494] If, however, bandits kill or usurp property, Mālik recommended that they be killed without being amputated or crucified.[495] Importantly, Mālik asserts that if a bandit is able to carry on his criminal activity for a long time and become powerful, the ruler does not have discretion and must have him killed even if the ruler cannot prove that the bandit killed or usurped property.[496] Furthermore, if a bandit usurps property or commits murder and is captured before he repents and surrenders, the bandit must be killed, amputated or crucified. The ruler cannot pardon him.[497] Fighting bandits or resisting them is to be considered a religious *jihād*.[498]

As a general matter, there are two categories in early Mālikī legal thought. The bandits who are treated according to the *ḥirāba* verse, and the Khawārij, who are an indefinite other. Although the Khawārij, unlike the bandits, are not liable for what they destroy, as long as they continue to adhere to their system of belief, they are to be killed all the same. Therefore, after citing some of the traditions indicating that the companions agreed to forgive all that had been destroyed in the *fitna*, Saḥnūn cites a tradition which provides that the Khawārij, unless they repent, "should be killed for their *baghy*." [499] This could mean that the Khawārij, and possibly other groups, are to be designated within a special category called the *bughā*, which is distinguished from the category of *muḥārib*. Nonetheless, this might be a distinction without a substantial difference. Ultimately, it is not clear whether the Khawārij are considered to be morally superior to bandits. For example, Mālik reportedly held that ritual prayers may not be performed on the Khawārij or similar sects. Their funerals may not be attended and their ill may not be visited.[500] Even more, Ibn Isḥāq reports that according to Mālik, sectarians such as the Khawārij should be killed for the corruption they cause in religion, which is derived from the idea of causing corruption on the earth. The corruption caused by the Khawārij in religion is no less evil than the corruption caused by highway robbers or bandits on the earth. Therefore, those sects are to be given an opportunity to repent, but if they do not, they are to be killed; not for being unbelievers (*kuffār*), but for causing corruption in religion and on the earth.[501] Another report maintains that Mālik argued that the Khawārij and all other innovators in religion (*ahl al-bida'*) are not to be considered infidels (*kuffār*), but they are to be asked to repent or be killed nonetheless. Reportedly, Mālik considered such groups to be worse than bandits or highway robbers because they cause corruption in religion, and causing corruption in religion is invariably worse than causing corruption on the earth.[502] Even if the opinions attributed to Mālik are in fact his,[503] it is not clear how, according to early

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[493] Saḥnūn, *al-Mudawwana*, vol. 4, 428.

[494] Ibid. Reportedly, in Mālik's time, captured bandits in Medina were sent to Fadak or Khaybar, two suburban districts, and imprisoned there.

[495] Saḥnūn, *al-Mudawwana*, vol. 4, 428-9.

[496] Saḥnūn, *al-Mudawwana*, vol. 4, 430.

[497] Ibid. Mālik, reportedly, also held that those who strangle people, or who give people a drink that renders them unconscious, or who break into homes to steal money are all to be considered *muḥāribs*. Ibid., 431-2.

[498] Ibid., vol. 4, 432.

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[499] Saḥnūn, *al-Mudawwana*, vol. 1, 410.

[500] Saḥnūn, *al-Mudawwana*, vol. 1, 407.

[501] Ibn 'Abd al-Barr, *al-Tamhīd*, vol. 23, 337.

[502] Ibn 'Abd al-Barr, *al-Tamhīd*, vol. 4, 238.

Mālikī doctrine, other rebels, who are not Khawārij or who do not belong to a recognizable non-Sunnī sect of Islam, are to be treated.[504]

The Qāḍī Abū 'Umar (d. 320/932), the Mālikī jurist, who lived well after al-Shafi'ī had articulated his doctrine on the *bughā*, was perhaps aware of the incongruity in the Mālikī discourses.[505] He cites the view that the Khawārij and others must repent or be killed. He, however, insists that the Mālikī doctrine regarding the *bughā* is exactly the same as al-Shafi'ī's: the wounded cannot be killed and the fugitive may not be pursued. He goes on to explain that the jurists have agreed that whoever breaks with the *jamā'a*, uses force, terrorizes the wayfarer and causes corruption on the earth must be killed unless he repents before he is captured. However, Abū 'Umar explains, these jurists have considered being defeated in battle and retreating a form of repentance. He, therefore, implies that while most jurists agree with Mālik's position on repentance (*istitāba*), the main difference is that these jurists considered retreat in battle a kind of repentance. Abū 'Umar goes on to criticize *ahl al-ḥadīth* for considering the Khawārij and other sects to be unbelievers (*kuffār*). He argues that a person who exercises his *'ijtihād* seeking God's approval, but is ultimately wrong, cannot be equated with an unbeliever. The *ahl al-ḥadīth* rely on several traditions from the Prophet which strongly condemn dissenting and waging war against the community. Nonetheless, Abū 'Umar notes, these traditions are opposed

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[503] For example, this last report is transmitted through Ibn al-Qāsim. Ibn al-Qāsim is explaining Mālik's views. One cannot be sure if this is Ibn al-Qāsim's own view or, if in fact, he is accurately conveying Mālik's opinions.

[504] The ambiguity surrounding Mālikī doctrine is compounded by their position on the *zanādiqa* (heretics). Early Mālikīs assert that the *zanādiqa* are the same as the hypocrites of Medina in the Prophet's time. They concede that the Prophet did not kill the *zanādiqa* but they argue that the Prophet did not do so because he feared that killing them would repulse people from becoming Muslims. After the Prophet died it became necessary to execute the *zanādiqa*. The *zanādiqa* are not to be killed for committing banditry or for causing corruption on the earth. They are to be killed because they are infidels (*kuffār*). Ibn 'Abd al-Barr, *al-Tamhīd*, vol. 10, 154-7. The question then is: what is the difference between the *zanādiqa* who are killed for *kufr*, and *ahl al-bida'* or *ahl al-'ahwā'* who are killed for causing corruption in religion, and bandits who are killed for causing corruption on the earth? There is no clear answer. There are only general concepts or tendencies that do not constitute a systematic or coherent position. Interestingly, the example of the hypocrites of Medina is cited by later jurists primarily from the Shāfi'ī school as proof that rebels should not be killed if they do not fight. For example, see al-Shīrāzī, *al-Muhadhdhab*, vol. 2, 283.

[505] Abū 'Umar presided over the execution of the Ṣūfī master al-Ḥallāj. See Melchert, *The Formation*, 173; Ibn al-'Athīr, *al-Kāmil*, vol. 7, 4-6.

and contradicted by other traditions which assert that anyone who declares the testament of faith cannot be declared an unbeliever.[506] Abū 'Umar goes on to argue that Mālik did not prohibit the performing of funeral prayers over the dead from sects such as the Khawārij. Rather, Mālik preferred that the laity, not the jurists, would perform the funeral prayers over such people. However, he argues, the majority of jurists did not object to performing the funeral prayers, and did not agree with Mālik on this point.[507]

Despite Abū 'Umar's best efforts at a reconstructive systematization, the early Mālikī doctrine did not become better clarified or more coherent. The Shafi'ī doctrine, as we will see, is in reality not at all similar to the early Mālikī position. Furthermore, the idea that the early Mālikī jurists considered a retreat from battle a form of repentance is creative but completely unfounded. Importantly, it is also not clear why the existence of a religious interpretation is a sufficiently material element such that it permits an exemption from liability, but is not sufficiently material as to ultimately prevent the execution of a Khārijī. In reality, early Mālikī juristic discourses do not have a doctrine of rebellion, but do have a doctrine of heterodoxy. This does not mean that rebellion was rejected or uniformly condemned; it only means that rebellion was not dealt with as a systematic and coherent issue.[508] Mālik, and perhaps more so, his students, were primarily concerned with condemning those who attack travelers or commit some form of armed robbery. It is also quite probable that Mālik considered the Khawārij and other sectarians to be heretics. Beyond issues of theology, early Mālikī discourses do not deal with the issue of rebels who might not necessarily adhere to heterodox ideas. Nevertheless, as the idea of the special status of *al-muta'awwilūn* (those who have an interpretation) found currency and spread, Ibn al-Qāsim, and later Saḥnūn, integrated the popular notion into Mālikī discourses, but did so in a largely unsystematic fashion.

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[506] Ibn 'Abd al-Barr, *al-Tamhīd*, vol. 23, 338-340.

[507] Ibn 'Abd al-Barr, *al-Tamhīd*, vol. 24, 132.

[508] It is very likely that with early Muslim jurists generally, but with Mālik particularly, rebels were dealt with on a case by case basis. A rebel, such as al-Nafs al-Zakiyya, who as noted earlier, was reportedly supported by Mālik and who might offer a greater opportunity for Islamicity or justice, would be considered the just one (*al-'ādil*), and supported if he was able to offer an orderly and stable just alternative. This sometimes degenerated into straddling the fence until a winner emerged; hence, 'Aḥmad b. Ḥanbal's statement, "We support whoever wins (*naḥnu ma'a manghalab*)."

Early Ḥanafī jurists reflect the same type of ambiguity regarding rebels and bandits. Nonetheless, it is clear that a general distinction is made between rebels, bandits and apostates. Al-Qāḍī Abū Yūsuf (d. 183/799), Abū Ḥanīfa's student, wrote his *Kitāb al-Kharāj* at the behest of the 'Abbāsid caliph Hārūn al-Rashīd, and he often responded to purported questions put to him by the Caliph. Abū Yūsuf was keen to point out that the Khawārij are in error, and that they have violated the consensus of the Prophet and the companions, but he did not extensively focus on the status of the Khawārij.[509] Abū Yūsuf went on to respond to a question purportedly put to him by the Caliph regarding how to conduct warfare against *ahl al-qibla* (fellow Muslims). Abū Yūsuf explained that the authentic reports that have reached him and his fellow Ḥanafī jurists, (*al-ṣaḥīḥ 'indanā min al-'akhbār*) are that 'Alī never fought his opponents without warning them first, and after defeating them 'Alī did not enslave or kill captives, did not kill the wounded or fugitive, and did not confiscate any of his opponents' properties.[510] Earlier, Abū Yūsuf argued that if people become apostates and wage warfare against Muslims, they may be taken captive and enslaved and their properties may be confiscated. After defeat, the rebels are to be pardoned. However, if the ruler fears that if he pardons the rebels they will re-organize or join another party and rebel again, the ruler may place them in prison until they repent.[511] Other than citing 'Alī as his authority, Abū Yūsuf does not explain why Muslims should be treated differently than apostates, and does not elaborate upon the distinction between apostates and rebels. Importantly, Abū Yūsuf uses the expressions fighting *ahl al-qibla* and *ahl al-baghy* interchangeably. The clear implication is that *ahl al-baghy* are Muslim rebels.[512]

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[509] Abū Yūsuf, *Kitāb al-Kharāj*, 59.

[510] Ibid., 214.

[511] Ibid., 67.

Abū Yūsuf notes two areas of disagreement. The author states that some have disagreed with the Ḥanafīs regarding property found in the rebels' war camp. Some have argued that what is found in the war camp, unlike all other properties, may be confiscated. Furthermore, some have argued that if the rebels' war camp remains standing or if the rebels have reinforcements (*'idhā kāna lahum fi'a yalja'ūna 'ilayhā*), then the captive, wounded and fugitive may be pursued and killed.[513] Significantly, Abū Yūsuf implies that this opinion is a minority position within the Ḥanafī school. Nonetheless, as Ḥanafism became the more popular legal school among Sunnī governments, this became the official position of the Ḥanafī school. Abū Yūsuf adds that the weaponry and livestock of the rebels may be confiscated and divided. But he re-emphasizes that 'Alī and his son al-Ḥasan disliked the killing of rebel prisoners of war, and that they used to release the prisoners after taking their weaponry.[514] Abū Yūsuf also adds that the loyalists (*'ahl al-'adl*)[515] killed in battle are to be treated as martyrs. Meanwhile, ritual prayers should not be performed on the dead rebels.[516]

In addressing the *bughā*, Abū Yūsuf does not refer to or cite Abū Ḥanīfa. While referring to some general indefinite debates about the treatment due to rebels, none of the doctrines he addresses seem to be firmly-established or well-developed. Nonetheless, Abū Yūsuf is actively partaking in constructing a collective memory about 'Alī's conduct, and then using this conduct as the yardstick of legality. While he mentions the disagreements among jurists concerning how rebels should be treated, he is keen to point out that ʻAlī preferred not to execute or persecute rebels. Abū Yūsuf states that some scholars (*baʻḍ al-mashyakha*) have told him that Jaʻfar al-Ṣādiq said that Muḥammad al-Bāqir said that ʻAlī in the Battle of Baṣra would not kill anyone who laid down his weapon or took sanctuary in a home, and that ʻAlī would not confiscate any of the rebels' personal properties.[517]

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[512] Ibid., 191, 214.

[513] Ibid., 214.

[514] Ibid., 215.

[515] Kraemer, "Apostates, Rebels and Brigands," uses the word loyalists to refer to *'ahl al-'adl*. I think this is an appropriate choice of words in most situations. It is not appropriate when one addresses the jurists who argued that the *bughā* are an unjust government and the *'ahl al-'adl* are the just rebels.

[516] Abū Yūsuf, *Kitāb al-Kharāj*, 214-5.

Abū Yūsuf does cite Abū Ḥanīfa, and disagrees with him, when he addresses *ḥirāba*. Abū Yūsuf simply defines the crime as the act of highway piracy with the purpose of killing and stealing property. Abū Yūsuf goes on to explain that Abū Ḥanīfa had ruled that if a *muḥārib* usurps property, he is to be amputated from opposite ends but not killed or crucified. If the *muḥārib* commits murder he is to be executed. If the *muḥārib*, however, usurps property and commits murder then, according to Abū Ḥanīfa, the ruler has three choices: 1. the ruler may execute the offender, and nothing else; 2. crucify the offender but not amputate him; 3. amputate the offender from opposite ends and then crucify or execute him. Abū Yūsuf, however, disagrees with his teacher, and says that in his opinion the penalties should be as follows: if the offender usurps property, he is to be amputated from opposite ends and nothing else; if he murders he is to be executed and nothing else, and if he commits murder and usurps property then he is to be crucified.[518] Effectively, Abū Yūsuf's approach takes all discretion away from the ruler because each crime has a specific punishment.

Significantly, Abū Yūsuf seems to assume that there is a difference between a bandit and a rebel. The punishments specified in the *ḥirāba* verse apply to bandits, meanwhile no specific punishments seem to apply to rebels. Nevertheless, it is not clear what distinguishes a rebel from a bandit other than the act of committing highway piracy. This raises the question of whether a rebel who attacks travelers may be treated as a bandit. The ambiguity that surrounds the two categories is emphasized in a passage in which Abū

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[517] Ibid., 215.

[518] Ibid.

Yūsuf discusses the liability of the rebels. Abū Yūsuf explains: "Whoever repents from amongst *ahl al-baghy* and follows the ruler, and listens to and obeys him, will not be held liable for blood or injuries caused by him during the battle. He will also not be held responsible for destruction of property unless usurped property is found in his possession; if usurped property is found in his possession, it will be returned to its [rightful] owner."[519] But then Abū Yūsuf goes on to say that the same is applicable to a bandit who commits highway piracy. If he repents before being captured and listens to and obeys the ruler, he will not be held liable for life and property destroyed in the course of his crime.[520] This passage means that bandits and rebels are expected to repent and obey, and by doing so they escape liability. The rebel escapes liability for what he destroyed while the bandit escapes the punishments specified in the Qur'ān. Although Abū Yūsuf cites 'Alī's clemency, the question remains: May a rebel be punished at the absolute discretion of the ruler?

The other Ḥanafī jurist who deals with the issue of rebellion and banditry is Muḥammad b. al-Haṣan al-Shaybānī (d. 189/804) in his *Siyar* from *Kitāb al-'Aṣl*. Majid Khadduri has translated Shaybānī's *Siyar,*[521] but whether or not this book was authored by al-Shaybānī is open to question. This book is reported to contain Abū Ḥanīfa's views, dictated by Abū Yūsuf to al-Shaybānī. Most copies of *Kitāb al-'Aṣl* do not contain the chapter on *Siyar* (this is the chapter that deals with issues relating to the conduct of state).[522] According to Khadduri, the oldest manuscript existing for the chapter on *Siyar* is from 638/1240.[523] Importantly, some of the views found in the text translated by Khadduri are too advanced to have been written in al-Shaybānī's lifetime. Many of these views are characteristic of the developed Ḥanafī position in the 4th/10th century or even later. Rather, the text translated by Khadduri contains a mixture of advanced Ḥanafī legal doctrine and earlier Ḥanafī views.[524] I am not necessarily doubting that al-Shaybanī wrote *Kitāb al-'Aṣl* or that there was, in fact, a part of this book that dealt with *siyar*. My argument is that additions have been made to the original text representing late Ḥanafī legal views.[525] Therefore, I have focused on the parts of the text that seem to represent early Ḥanafī doctrine.

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[519] Ibid.

[520] Ibid.

[521] Majid Khadduri, trans., *The Islamic Law of Nations: Shaybānī's Siyar* (Baltimore: Johns Hopkins Press, 1966).

[522] Ibid., 70. The printed edition of *Kitāb al-Aṣl* does not contain this chapter. Abū 'Abd Allāh Muḥammad b. al-Ḥasan al-Shaybānī, *Kitāb al-'Aṣl al-Ma'rūf bi al-Mabsūṭ*, ed. Abū al-Wafā' al-'Afghānī, 5 vols. (Beirut: 'Ālam al-Kutub, 1990). Another book attributed to the same author also does not address rebellion or banditry. The only thing mentioned in that source is that Abū Ḥanīfa held that if a man raises his sword against Muslims, they may kill him without being liable. It is not clear whether this applies to fighting a thief or a rebel or both, see Abū 'Abd Allāh Muḥammad b. al-Ḥasan al-Shaybānī, *al-*

The text attributed to al-Shaybānī emphasizes 'Alī's clemency with rebels. Prisoners may not be killed or enslaved, and the property of rebels may not be confiscated.[526] The text also attributes to Abū Ḥanīfa the view that if the rebels have a group to which they may take refuge (*fi'a*), then the rebel prisoners may be killed, the fugitive pursued, and the wounded dispatched.[527] Nonetheless, as noted above, it is

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Jāmi' al-Ṣaghīr (Beirut: 'Ālam al-Kutub, 1986), 513. Abū Yūsuf's, *al-Radd 'alā Siyar al-'Awzā'ī*, ed. Abū al-Wafā' al-'Afghānī (Beirut: Dār al-Kutub al-'Ilmiyya, n.d.), does not report any of Abū Ḥanīfa's views on rebels or rebellion.

[523] Khadduri, *The Islamic Law*, 71.

[524] Al-Sarakhsī (d. 483/1090-1) wrote a commentary on what is purportedly al-Shaybānī's *Siyar*. See Abū Bakr Muḥammad b. 'Aḥmad b. Sahl al-Sarakhsī, *Sharḥ Kitāb al-Siyar al-Kabīr*, 5 vols. (Cairo: Maṭba'at Sharikat al-'I'lānāt al-Sharqiyya, 1971). But this work was written by al-Sarakhsī from memory in prison, and it mostly contains al-Sarakhsī's own views. Furthermore, the discrepancies between Khadduri's text and al-Sarakhsī's text are too great for one to be able to conclude that there is any relation between the two sources. According to the *Siyar*, al-Shaybānī makes passing reference to fighting the *bughā*. See al-Sarakhsī, *Sharḥ*, vol. 3, 1035, vol. 4, 1439, vol. 5, 2263.

[525] Khadduri, throughout his translation, corroborates various points made in the translated text by citing late Ḥanafī sources. The very fact that there is such close correlation between the points made in the translated text and late Ḥanafī sources is a further indication that late Ḥanafī opinions were added to the text Khadduri is translating. Norman Calder contends that *Kitāb al-'Aṣl* and other early texts reflect the organic growth of Islamic law. Hence, these books have been authored, edited, redacted and systematized by various authors. See Calder, *Studies*, 39-66. I agree that one can discern evidence of some editing of early legal texts. However Calder exaggerates the significance and pervasiveness of this process. Furthermore, his methodology for dating texts is unpersuasive.

[526] Khadduri, *The Islamic Law*, 230.

[527] Ibid., 232, 243.

doubtful that this had become by al-Shaybānī's time settled Ḥanafī doctrine. Rather, the idea that a rebel group that has access to reinforcements or that has a group to which it can take refuge is to be treated more harshly, seems to have been one of the competing schools of thought in al-Shaybānī's time. While the text argues that rebels are not to be held liable for life and property destroyed during the course of their rebellion, no sharp distinction is maintained between highway robbers or bandits and rebels.[528] The discussions on highway robbers are intermingled with discussions on rebels.[529] Nonetheless, Abū Ḥanīfa is reported to have maintained that those who fight with a *ta'wīl* (a different religious interpretation) must be treated differently than "marauding adventurers" who commit crimes for private gain.[530] However, in response to the question: "Why should not the rebels be held liable for whatever of those things that they have committed [i.e. crimes]?" The text gives a rather technical response: "Because the rulings [of the loyalists] do not apply to them [in rebel territory] and they (the rebels) would be regarded as having been separated [from the Muslims] like the inhabitants of territory of war."[531] According to this logic, rebels are exempted from liability for offenses committed during the course of or after the rebellion because of a jurisdictional point. The rebels' camp during the rebellion or any territory over which they might have prevailed after the rebellion is considered to be outside the jurisdiction of the loyalist forces. Therefore, the loyalists do not have jurisdiction over crimes or offenses committed in rebel territory.[532] If rebels, however, commit an infraction before they commence their rebellion, they will be held liable because before the rebellion commences, the rebels remain under the loyalists' jurisdiction.[533] Importantly, it is not the interpretation adopted by the rebels that exempts them from liability, but the notion that rebels have a separate jurisdictional domain than loyalists.

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[528] Ibid., 234, 247. See also al-Sarakhsī, *Sharḥ*, vol. 4, 1439, vol. 5, 2263.

[529] For example, Ibid., 149-150.

[530] Ibid., 250.

[531] Ibid., 235.

[532] Ibid., 238-239.

This position is entirely consistent with the developed Ḥanafī doctrine of jurisdiction. For example, the Ḥanafīs argue that Islamic laws cannot be applied outside the jurisdiction of Muslim territory.[534] It is difficult, however, to ascertain whether the Ḥanafī theory of jurisdiction had become sufficiently developed as to warrant this argument or if this portion of al-Shaybānī's text was added later. Nonetheless, the evidence does seem to indicate that issues relating to the jurisdiction of Islamic law were debated between al-Shaybānī and Abū Yūsuf early on.[535] The question then becomes: How does one analyze the fact that rebels are recognized as having a separate jurisdiction, at least during the course of or after the commencement of their rebellion?

One should take note of the fact that al-Shaybānī reportedly maintains that rebels are to be considered Muslims.[536] Yet, he argues that funeral prayers may not be performed by loyalists over dead rebels.[537] Furthermore, al-Shaybānī reports that Abū Ḥanīfa held that taxes collected by rebels should not be re-collected or re-exacted.[538] Furthermore, if loyalists prevail over a territory occupied by rebels, they should affirm the judgments and adjudication of rebels if such adjudications are just or legally supportable, even if only by a minority view.[539] In view of these various indicators mentioned above, one could argue that, although the evidence is mixed, recognizing that rebels have a separate jurisdiction is tantamount to recognizing the legitimacy of the act of rebellion or rebels. In other words, by arguing that rebels are not liable because during the course of their rebellion they maintain a separate and distinct jurisdiction, Ḥanafī jurists have effectively granted a degree of legitimacy to the act of rebellion. I think, although this argument has its merits, it is inaccurate for three reasons. First, if the Ḥanafī doctrine of jurisdiction had become sufficiently established by al-Shaybānī's time, then the jurisdictional argument as it applies to rebels could be nothing more than a technical extension of precedent. In other words, the argument regarding jurisdiction could be a product of Ḥanafī legal culture, and not necessarily an ideologically motivated application of legal principles. Second, al-Shaybānī draws an analogy between the legal jurisdiction of rebels, and the legal jurisdiction of unbelievers in the abode of war. This could hardly be a positive association which somehow recognizes the legitimacy of rebellion. Third, recognizing that rebels have a separate jurisdiction, and affirming the rebels' executive tax decisions and their legal adjudications, is quite consistent with the juristic preference for consistency, order and stability, and not necessarily a radical sanctification of rebellion or rebels.

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[533] Ibid., 240.

[534] See Abou El Fadl, "Islamic Law and Muslim Minorities," 173-174.

[535] Ibid.

[536] Khadduri, *The Islamic Law*, 253.

[537] Ibid., 241.

[538] Ibid., 233.

[539] Ibid., 250. Reportedly, the caliph 'Abd al-Malik b. Marwān affirmed the legal judgments of the rebel 'Abd Allāh b. al-Zubayr after defeating him. 'Abd al-Malik asserted that reversing previous judgments and re-litigating cases would be difficult to do. See Wakī' (d. 306/918), *'Akhbār*, vol. 1, 130. As we will

The first systematic exposition on the law of rebellion is that by al-Shāfiʿī (d. 204/819). He, however, did not invent the field. It is clear from al-Shāfiʿī's own arguments that he is referring to concepts and ideas that are already circulating in his time. He simply co-opts these ideas and concepts into a systematic discourse on the issue.[540] Like other jurists in his time, he does not focus on whether or when rebellion would be justified. Rather, his main focus is on the technical issue of how rebels should be treated

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see, affirming the judgments or adjudications of rebels became an accepted legal doctrine in the juristic discourses.

[540] There is a considerable amount of work published on al-Shāfiʿī's role in the development of Islamic jurisprudence. Wael Hallaq has challenged the idea that al-Shāfiʿī was the chief architect of Islamic jurisprudence. Al-Shāfiʿī, Hallaq argued, played a very important role in the development of Islamic jurisprudence but his role was not as central as some have assumed. See Wael Hallaq, "Was al-Shafi'i the Master Architect of Islamic Jurisprudence?" *International Journal of Middle East Studies* 25, no. 4 (1993): 587-605. I think that Hallaq's points are persuasive.

or regarded, and in justifying his arguments by grounding them in authoritative Islamic sources or precedents. Most of al-Shāfi'ī's arguments are phrased in terms of a disputation between him and his opponents, and, on occasion, although he concedes that his arguments are without precedent, he still insists that they are more authentically Islamic than the doctrines adopted by his opponents. Furthermore, as we will see, many of the later sources claim that al-Shāfi'ī had completely changed his views on the *bughā* when he moved to Egypt. This is consistent with the argument that once having removed himself from the political turmoils of his day, he proceeded to develop a legal discourse on rebellion that is largely unhelpful to those in power.

Al-Shāfi'ī starts his exposition by citing the verse on *baghy*. He notes that two things are discernible about the verse: first, the verse does not mention liability for life or property destroyed if two Muslims fight. Second, the verse clearly prefers reconciliation over fighting. Al-Shāfi'ī concedes that it is possible to interpret the verse as to require liability, at least for death and injuries, but the preferred view is that the verse requires that liability for blood and property be dropped altogether. This, al-Shāfi'ī argues, is due to the *ḥadīth* by al-Zuhrī that the companions agreed that after the *fitna* no one would be held liable for life or property destroyed.[541] Al-Shāfi'ī sets this out as the basis on which the rest of his discussion will be structured. The Qur'ānic verse prefers reconciliation, and prefers that amnesty be given to all *bāghīs*. Importantly, the Qur'ānic verse affirms that despite his rebellion, the *bāghī* remains a Muslim, and is to be treated as such. He is not fought with the purpose of killing or destroying him. Rather, he is fought for the limited purpose of repelling or resisting his aggression.[542]

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[541] Al-Shāfi'ī, *al-'Umm*, vol. 4, 214. See also al-Bayhaqī, *Ma'rifa*, vol. 6, 278-9, who refers to the same argument by al-Shāfi'ī.

[542] Al-Shāfi'ī, *al-'Umm*, vol. 4, 223. See al-Bayhaqī, *Ma'rifa*, vol. 6, 278, discussing al-Shāfi'ī's position. Al-Ṭabarī (d. 310/922) reports that some of the "heretics and ignorant" argued that pursuant to the *baghy* verse, a rebel Muslim may be killed, al-Ṭabarī, *Jāmi'*, vol. 25, 82. On the other hand, al-Bayhaqī, *al-Sunan*, vol. 8, 188, reports that some have argued that the *bughā* should not be fought or killed. The later group criticized al-Shāfi'ī for effectively sanctioning the killing of people such as Mu'āwiya, al-Bayhaqī, *Ma'rifa*, vol. 6, 284. According to al-Bayhaqī (d. 458/1065), al-Shāfi'ī's response is that both

A *bāghī*, al-Shāfi'ī argues, is one who refuses to obey the just ruler (*al-'imām al-'ādil*), and intends to rebel by fighting him.[543] It is not clear at this point what is meant by the expression "just ruler." It could mean the ruler who rules justly or it could mean the legitimate or rightful ruler. The former meaning looks to the substantive quality of the ruler's reign. The latter meaning is concerned with how the ruler came to power regardless of how just or unjust his rule might be. This point becomes the subject of extensive debate in later Islamic discourses. Al-Shāfi'ī, however, seems to use the expression to mean the substantively just ruler. This implies that those who rebel against an unjust ruler are not rebels at all, and in fact, later jurists explicitly argue that if the ruler is unjust and the rebels are just, then the ruler is to be considered the *bāghī* and not the rebels. Nonetheless, al-Shāfi'ī does not explicitly argue that those who rebel against the unjust ruler are not to be considered rebels. The reason for this is rather speculative. One notices that the model al-Shāfi'ī has in mind for all his discussions on the *bughā* is that of the caliph 'Alī, and to a lesser extent Abū Bakr. 'Alī is the model and the source of authority for the vast majority of al-Shāfi'ī's arguments. Al-Shāfi'ī could not have been unaware that the 'Abbāsid caliphs of his day and age laid claim to a high degree of Islamic authenticity, and claimed to be the rightful and just rulers. In a sense, al-Shāfi'ī is setting 'Alī as the standard by which the justice of the ruler is to be evaluated. In other words, it is as if al-Shāfi'ī is arguing to the 'Abbāsids of his age: "If you claim to be the rightful and just rulers, then this is how just rulers treat rebels." In effect, al-Shāfi'ī is setting up a moral and legal standard by which the rulers of his age could be judged. At the same time, the door is left open for the possibility of declaring, if need be, a certain rebellion justified because the ruler is unjust. This is exactly why Ibn Taymiyya, as we saw, accuses al-Shāfi'ī and others who followed in his footsteps of opening the door for rebellion and civil discord, and encouraging chaos

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groups are confusing between killing and fighting (*al-qatl ghayr al-qitāl*). The verse permits the fighting but not the killing the *bughā*. Effectively, this means that the *bughā* may be fought, as a defensive measure, in order to repel their aggression, but it does not permit the execution of the *bughā*, al-Bayhaqī, *al-Sunan*, vol. 8, 188.

[543] Al-Shāfi'ī, *al-'Umm*, vol. 4, 216.

and anarchy. Speculative as at might be, I believe that this argument is further supported by the structure of al-Shāfi'ī's arguments which we discuss below.

Al-Shāfi'ī is keen about citing and enlisting, not just the precedent of 'Alī, but also Abū Bakr in support of his arguments. Those who rebelled against the caliph Abū Bakr, al-Shāfi'ī argues, were of two distinct types, the apostates and the *bughā*. The apostates renounced Islam altogether, but the *bughā*, relying on an erroneous interpretation of the Qur'ān, refused to pay taxes to Abū Bakr. These rebels, al-Shāfi'ī asserts, argued that taxes were paid to the Prophet when he was alive because the Prophet's prayers were a source of security and peace for the believers. The Qur'ān states: " [Oh, Prophet] from their money take alms so that you might purify and sanctify them, and pray for them for your prayers are a source of security for them. God is the One who hears and knows all."[544] After the Prophet died, Abū Bakr was not entitled to collect alms because Abū Bakr's prayers are not a source of peace and security. Therefore, these rebels argued they should not be obligated to pay alms to Abū Bakr. Since Abū Bakr was the just ruler, he had every right to demand that alms be paid to him just as they were paid to the Prophet. Abū Bakr gave the rebels every opportunity to recant, but when they refused to do so, they committed an act of rebellion (*khurūj* or *'imtinā'*). The fact that they committed an act of rebellion meant that the rebels could be fought. But because they relied on a plausible, even if ultimately erroneous, interpretation, this meant that they would not be held liable for any damage caused in the course of their rebellion.[545] Importantly, al-Shāfi'ī argues, this means that fighting the rebels until they are defeated is permitted. However, nothing beyond fighting them to insure compliance with the law is to be allowed. Unlike bandits or highway robbers, the blood and money of rebels who fight because of an interpretation (*ta'wīl*) remain legally protected and religiously sanctified. Bandits or highway robbers do not rely on an interpretation, and are simply motivated by prurient interests such as financial gain. Therefore, bandits or highway robbers are fully liable for all of their criminal activity.[546] Al-Shāfi'ī goes on to emphasize his essential point:

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[544] Qur'ān 9:103.

[545] Al-Shāfi'ī, *al-'Umm*, vol. 4, 215-216.

> "It is not proper to claim that a rebel's blood may be spilled without exception. Rather, one should say that if a rebel refuses to comply with a law that applies to him, or rises and fights while aided by a group of rebels, we may fight him either to protect ourselves or to insure compliance with what is demanded of him. If the rebel is killed during the course of the fight, we are not liable for his blood because it has become legal to kill him under these [limited] circumstances. But if the rebel retreats, or abandons his defiance, or is captured, or is wounded, or becomes ill so that he can no longer fight, it is no longer permissible to kill him. Because of the aforementioned, one cannot say that [as a matter of principle] a rebel's blood may be shed. [This is exactly why] a rebel may not be killed if he stops fighting, or is captured or wounded."[547]

In effect, al-Shāfi'ī argues that three separate components must exist for a rebel to qualify for the technical category of a *bāghī*. First, the rebel must have an interpretation (ta'wīl); second, the rebel must commit an overt act of rebellion *(khurūj)*; and third, the rebel must be a part of a larger group of rebels. He must have some power base (referred to as *min'a*, *shawka*, or *fi'a*). Al-Shāfi'ī goes on to elaborate upon the third element by arguing that if one or two rebels rely on an interpretation, and rebel without the support of a more formidable group, the one or two rebels will be liable for any crimes committed. The reason that we require that the rebel act within the context of a large group, al-Shāfi'ī argues, is that when Ibn Muljim assassinated 'Alī, the caliph did not exempt him from liability. Ibn Muljim did, in fact, rely on an interpretation, but because he acted as an individual, 'Alī, while on his death bed, said that Ibn Muljim is not to be exempted from liability.[548] Al-Shāfi'ī is careful to add that 'Alī's dying wish was that Ibn Muljim not be tortured or mutilated.[549] Nonetheless, al-Shāfi'ī does not explain how much of a group is needed in order for the rebels to qualify as *bughā*. He only states that one or two individuals, or a small group that can be easily defeated is to be held fully liable for its criminal activity, while a larger group that cannot be easily subdued should not be held liable.[550]

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[546] Ibid., vol. 4, 216.

[547] Ibid., vol. 4, 223.

[548] Ibid., vol. 4, 216.

[549] Ibid., vol. 4, 217. Al-Shāfi'ī, and the vast majority of jurists after him, do not refer to the reports, mentioned earlier, that Ibn Muljim was tortured to death. It is possible that al-Shāfi'ī never heard of the reports about Ibn Muljim's torture. It is also possible that he had heard of these reports but simply

Al-Shāfi'ī goes on to give greater specificity to his discourse and to address the Khawārij in particular. He argues that if a group, for example, adopts the views of the Khawārij and isolates itself from society, this alone does not make fighting them permissible. In fact, they are not to be prevented from going to the mosque or marketplace, and their testimony is to be accepted in court like any other Muslim. Al-Shāfi'ī argues that the Khawārij, and any other unorthodox group (*ahl al-'ahwā'*), in terms of their rights and duties, are not to be treated differently from any other Muslim group. However, if these groups believe that all Muslims are infidels and believe that it is permissible to lie in court when litigating against infidels, then their testimony cannot be trusted or relied upon, and should be excluded.[551] Furthermore, if a group commits a crime *before* they adopt a system of belief or interpretation (*ta'wīl*), choose a leader and rise in rebellion, as a group, they are to be treated like any other Muslims, and should be held liable for whatever crimes they commit.[552] In other words, the turning point is the crucial moment when one can say that the group has adopted an interpretation, started acting as a cohesive whole, and committed a clear act of rebellion.[553] For example, al-Shāfi'ī argues, 'Alī treated the

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discounted them because he was interested in creating a discourse that would require that rebels be treated in a humane and benevolent fashion. One, of course, cannot discount the possibility that the reports about Ibn Muljim's torture, like the reports about al-'Urayna tribe, were invented by the supporters of the 'Umayyads who wished to justify the often cruel treatment of rebels. It is also possible that the Ibn Muljim's torture report was invented by extremist Shī'ī sects (*al-ghulāt*) who seemed to obtain satisfaction from imagining all types of torments that ought to befall the killer of 'Alī.

[550] Ibid., vol. 4, 218.

[551] Ibid., vol. 4, 217.

[552] Ibid.

[553] If the rebels disavowed society and isolated themselves – in other words, if they lived in peaceful exclusion, they may not be fought. Ibid., vol. 4, 226.

Khawārij like any of his subjects. He did not persecute or discriminate against them. When they isolated themselves in a specific locality, 'Alī appointed a governor to lead them. But when they killed the governor 'Alī appointed, 'Alī demanded that they hand in the murderer. The Khawārij, however, refused, and claimed that the whole group was responsible for the governor's death. Only then did 'Alī fight and subdue the group.[554]

Al-Shāfi'ī then proceeds to describe the specific rules of engagement, and the details of the treatment due to the rebels. The rebels must be first warned, debated, and given a full chance to repent before being fought.[555] He reiterates that they are to be fought only as long as they continue to fight. The moment they retreat or drop their weapons they may not be fought or killed. Mangonels, flame throwers or other weapons of mass destruction may not be used against the rebels unless under circumstances of dire necessity. Dire necessity means that the rebels use these weapons first or if the rebels occupy a fortress where it becomes difficult to defeat them otherwise. Furthermore, the ruler may not seek the aid of non-believers against Muslim rebels.[556] Importantly, the ruler may also not seek the aid of Muslims who believe that it is permissible to kill a fugitive rebel or a rebel who has surrendered.[557] If people of the book (*ahl al-dhimma* -- primarily Christians and Jews living in Muslim territory under an agreement of protection) assist Muslim rebels, this does not void their covenant of safe conduct. However, unlike Muslim rebels, they are to be held liable for any life or property they may have destroyed during the course of the rebellion.[558]

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[554] Ibid, vol. 4, 217.

[555] Ibid., vol. 4, 218, 226. Al-Shāfi'ī argues that the rebels must be warned first because they might mention an injustice that has befallen them or they might complain about a governor who is oppressing them. In this case, the injustice must be redressed and the oppressive governor must be dismissed. He also rejects the argument that fighting Muslim rebels is in any way similar to fighting unbelievers.

[556] Ibid., vol. 4, 219, 228-9. Al-Shāfi'ī argues that the aid of unbelievers may be sought against other unbelievers. But the aid of unbelievers may never be sought against fellow Muslims.

[557] Ibid., vol. 4, 219. This is a direct rebuke to Ḥanafī jurists who argued that the fugitive may be killed. This becomes an area of considerable debate in later Islamic discourses.

Once a Muslim rebel surrenders, he is not to be killed. Al-Shāfi'ī argues, however, that a rebel may be imprisoned until he gives the just ruler his oath of allegiance, but he also notes that it is preferable that a rebel not be imprisoned at all. There is a question, al-Shāfi'ī contends, whether a rebel's wife and children may not be imprisoned for any period of time.[559] Even more, if a loyalist kills a fugitive or surrendering rebel, the loyalist will be liable for wrongfully killing the rebel.[560] Furthermore, al-Shāfi'ī goes beyond the argument that the property of the rebels may not be confiscated. He argues that any property found in the rebel camp may not be divided as spoils of war, and may not be used even for a temporary period of time. In addition, weapons and cattle captured from the rebels may not be used against them.[561]

Al-Shāfi'ī dedicates a large portion of his argument to refuting the claim that if the rebels have a group (*fi'a*) to which they may retreat or to which they may turn for assistance, that they may be killed or pursued, and that their wounded may be dispatched. He constructs his refutation on several levels of argument. First, al-Shāfi'ī contends that 'Alī never pursued the fugitive or killed a prisoner. He accuses his opponents of making an argument by negative implication. According to al-Shāfi'ī, his opponents concede that 'Alī never gave permission to kill the wounded or fugitive. However, his opponents argue that 'Alī, in the Battle of the Camel, did not allow the killing of the wounded or fugitive because 'Alī's opponents did not have a group to which they could turn or ask for assistance. By implication, if the people of the Camel did have such a group then 'Alī

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[558] Ibid., vol. 4, 221.

[559] Ibid., vol. 4, 219.

[560] Ibid., vol. 4, 220. Al-Shāfi'ī argues that the loyalist should be asked to take an oath that he (the loyalist) erroneously thought that the rebel was not surrendering or escaping. If the loyalist takes the oath, he is responsible for the rebel's blood money. If, however, the loyalist refuses to take the oath, he is to be penalized for the wrongful killing.

[561] Ibid., vol. 4, 225. Al-Shāfi'ī argues with his imaginary interlocutor by asserting that it is well-established that 'Alī refused to confiscate any property found in the rebel camp. Even a pot, in which the loyalist soldiers were cooking, was promptly returned. Then how can one argue that anything found in the rebels' camp may be considered spoils of war?

would have permitted the killing of the wounded and fugitive. Al-Shāfi'ī contends that this argument by negative implication assumes a state of facts that did not exist. Therefore, it is inherently flawed and illogical. Nothing short of a direct command by 'Alī permitting the killing of the fugitive or wounded would have sufficed. Second, Abū Bakr and 'Alī captured many rebels, yet they never beat or killed a surrendering rebel. In fact, when 'Alī fought the rebels of Syria, Mu'āwiya was at all times able to lend assistance to his party. In other words, the rebels of Syria always had a *fi'a* or group to which they could turn for assistance. Nevertheless, 'Alī refused to punish or execute the Syrian rebels. Third, al-Shāfi'ī argues that his opponents concede that even if we find that a group of rebels intend to fight, and are in the process of sharpening and readying their weapons, it is not permitted to fight them. A mere suspicion or fear of rebellion is not enough to justify waging war against the rebels. How then, al-Shāfi'ī rhetorically asks, can one claim that if the rebels have a group that *might* possibly lend support, it becomes permissible to kill the wounded, prisoner or fugitive? Even when we know for a fact that the rebels have a group ready and willing to lend support, as in the case of Mu'āwiya and his people, it does not change the fact that the fugitive may not be pursued and the prisoner may not be executed.[562]

Not only may the rebels not be executed or the fugitive pursued, but a dead rebel may not be crucified, and his head may not be severed and sent to the ruler. The corpse of a rebel must be properly washed and buried without mutilation.[563] Al-Shāfi'ī also takes issue with the argument that funeral prayers may not be performed on a dead rebel. He poses the rhetorical question: What possible reason could there be for not performing the funeral prayers on a rebel? Al-Shāfi'ī's imaginary interlocutor responds that this is a form of punishment for a rebel; a rebel should not be honored in death. Al-Shāfi'ī says: "If that is so, then is it permissible to burn the corpse of a rebel or crucify it or sever the head and send it across the land, for this is surely more degrading? The interlocutor responds: "No, that would not be allowed." Al-Shāfi'ī then says: "Well, if we confiscate the property of a rebel that would be a greater deterrence to people so that they may not follow in the footsteps of a rebel. Yet, we do not punish a rebel with anything beyond what is [legally] permitted. We recognize a rebel's testimony, and his marriage and we inherit from him, and we do not withhold from him anything that is permitted to any other Muslim, so how is it that you wish to punish him by proscribing funeral prayers alone?" The interlocutor is unable to respond, and al-Shāfi'ī concludes that a rebel must be treated within the limits of legality, and nothing beyond the confines of the law is permitted or allowed.[564]

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[562] Ibid., vol. 4, 224. Al-Shāfi'ī also strongly rejects the position which contended that leniency towards rebels is a discretionary act of kindness. The idea that 'Alī's leniency was merely a discretionary act implies that 'Alī's example is merely persuasive but not mandatory or obligatory. Al-Shāfi'ī contends that 'Alī's conduct arose out of a firm religious and legal obligation, and is binding on all Muslims who exist after him.

[563] Ibid., vol. 4, 222. This is obviously a direct attack on the common practice during al-Shāfi'ī's time of crucifying dead rebels and sending their heads to the governor or the caliph.

Significantly, al-Shāfi'ī rejects the Ḥanafī argument that the rebels have a separate jurisdiction, and that the loyalists do not have jurisdiction to punish crimes committed in rebel territory. Al-Shāfi'ī argues that because the rebels are Muslims, they fall under Muslim jurisdiction, and therefore, if someone commits a crime such as murder or adultery, he or she may be prosecuted by the loyalists for the commission of such a crime.[565] This is consistent with the general Shāfi'ī position that Islamic laws have personal jurisdiction, and, hence, should apply to Muslims even in non-Muslim territory.[566] Therefore, one should avoid reading too much into this rather technical point of law. Nonetheless, al-Shāfi'ī's argument does imply that the abode or territory of the rebels remains a part of the abode or territory of Islam.[567] Importantly, al-Shāfi'ī argues that the decisions of judges in rebel territory should be treated like the adjudications of any other Muslim judge. They are to be affirmed or overturned on the same basis that apply to any other Muslim judge in loyalist territory.[568] If a judge from rebel territory writes a witnessed letter confirming or claiming certain rights against a man living in loyalist territory, it is recommended that the letter not be accepted because this does not constitute a proper judgment, and because it is feared that the witnesses, living in rebel territory, would be willing to lie in order to wrongfully take property belonging to loyalists.[569] However, if rebel witnesses appear in person, their testimony may be accepted. Yet, al-Shāfi'ī argues, if a judge in rebel territory is known to be just, his letter should be accepted, and given full force.[570] Al-Shāfi'ī also adds that if a rebel has a claim of right or cause of action against a man in loyalist territory, the rebel's cause or claim must be recognized and given full force . Even if rebels refuse to recognize loyalists' claims of right or causes of action in rebel territory, retaliation in kind is not permitted.[571]

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[564] Ibid., vol. 4, 225. Interestingly, al-Shāfi'ī is rather non-committal about the status of dead loyalists. He reports that there are two opinions about the loyalists. Some have argued that they are to be treated as martyrs while others disagreed. He does not advocate a particular position. Ibid., vol. 4, 222.

[565] Ibid., vol. 4, 227-228. The Ḥanafī interlocutor argues that if a person commits a crime in rebel territory, then he is liable before God on the Final Day. However, he may not be prosecuted on this earth by loyalists for lack of jurisdiction.

[566] See Abou El Fadl, "Islamic Law and Muslim Minorities," 173-174.

Several of al-Shāfi'ī's points pertain to issues relating to the conduct of state or international law. For example, if the rebels join the loyalists in fighting non-Muslims they are entitled to an equal share of the spoils.[572] If the rebels sign a peace treaty with unbelievers, the loyalists must honor the treaty and give it full force.[573] Furthermore, if unbelievers take rebels captive and enslave them, loyalist forces must continue to fight the unbelievers until they liberate the Muslim rebels from their hands.[574] If the rebels and the loyalists enter into a treaty and exchange hostages as security, even if the rebels violate the treaty or kill the hostages, the loyalists may not retaliate in kind, and may not kill the hostages under their control.[575] In effect, the rebels' own illegal conduct does not justify illegal retaliatory measures by the loyalists.

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[567] This does not necessarily mean that al-Shāfi'ī was insisting on the essential unity of all Muslim territory or refusing to recognize the legitimacy of divisions within the abode of Islam. Making such assumptions, is reading political theory into what is an inherently technical legal discourse. For example, as noted above, al-Shāfi'ī argues that Islamic law has universal jurisdiction. This does not mean that al-Shāfi'ī believes that the whole world is unified under the banner of Islam. One should note, however, that later Shāfi'ī jurists explicitly state that rebel territory is part of the abode of Islam. For example, see al-Māwardī, *al-'Aḥkām*, 76, who argues that weapons of mass destruction should not be used against rebels because rebel territory remains a part of the abode of Islam.

[568] Al-Shāfi'ī, *al-'Umm*, vol. 4, 220.

[569] Ibid. This is the equivalent of a judgment rendered by a judge in rebel territory *in absentia*. Since the witnesses signing the claim of right are not available, it is not possible to confront them and take their testimony directly.

[570] Ibid., vol. 4, 220-221, 228.

[571] Ibid., vol. 4, 221.

Effectively, al-Shāfi'ī makes three elements irrelevant or inapposite to the issue of how rebels should be treated. One, al-Shāfi'ī does not seem to be very concerned with the conduct of the rebels. He, however, is concerned with the conduct of the government and its forces. The behavior of the rebels will not define the limits of legality, and as far as the government is concerned, regardless of how the rebels conduct themselves, the law sets the standards which differentiate between legality and illegality. In relation to the government, the conduct of the rebels is not a legally material factor as long as the rebels rely on an interpretation, and fulfill the condition of *min'a* or *shawka*.[576] Two, whether the ruler is just or not is largely irrelevant to the problem of how rebels should be treated. As we noted earlier, even if the ruler is just, and even if those who rise against him are considered rebels, the various rules of engagement and treatment, which al-Shāfi'ī outlines, will still apply. A purportedly just ruler is not given discretion to treat rebels as he sees fit, and therefore, the issue of the justness or lack thereof of the ruler is made irrelevant to the issue of how rebels are to be treated. Three, the specific substance or content of the interpretation adopted by the rebels is rendered inapposite as well. By arguing that the

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[572] Ibid., vol. 4, 221. However, the just ruler is entitled to the one-fifth (*al-khums*) of the shares reserved as the right of the public treasury.

[573] Ibid., vol. 4, 221.

[574] Ibid., vol. 4, 222.

[575] Ibid., vol. 4, 222.

[576] Ibid., vol. 4, 218.

Khawārij and all unorthodox groups (*ahl al-'ahwā'*) are entitled to be treated as *bughā*, al-Shāfi'ī brings them within the purview and dominion of the law. However, he also brings the dominion of the law to their opponents by insisting that the Khawārij be treated within the specific confines of the law. As such, al-Shāfi'ī renders the specific content of the interpretation adopted by the rebels irrelevant to the issue of how they are to be treated. It is not clear from al-Shāfi'ī's discourse how far he is willing to take this point. In other words, it is not clear when rebellion ends, and apostasy and heresy begin.

One of al-Shāfi'ī's primary objectives is to make the treatment of rebels more humane. In early Islamic history, rebels were treated by the state basically as bandits, and crucifying or mutilating rebels was common practice. This early historical practice resulted in a mixed juridical tradition which exhibited conflicting trends. One trend thought of rebels as the equivalent of highway robbers or bandits, while the other trend distinguished rebels, in some form, without clearly delineating the way in which rebels are distinct and separate from common criminals. Two factors contributed to the construction of the discourse on *'aḥkām al-bughā*. One, the early juridical experience, and the precedent set by the companions of the Prophet and their predecessors did not necessarily demonize rebellion. Two, the jurists were developing a distinct legal culture which aspired to bring the caliphal power under the authority of the *Sharī'a*. This meant imposing limits on how the caliph may deal with rebels and even bandits. Therefore, al-Shāfi'ī, for example, limits the discretion of the caliph in dealing with bandits, and insists on a strict *tartīb* regime.[577] But he also insists on a relative degree of humaneness in dealing with highway robbers and bandits. For example, he rejects the argument that a bandit may be crucified first and then killed because, he argues, this is a form of torture and torture is prohibited in Islam. A bandit is to be killed first, and then his corpse is to be crucified.[578]

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[577] Ibid., vol. 6, 151-152. According to al-Shāfi'ī, if a bandit kills and usurps money, he is to be killed and crucified. If he commits murder alone, he is to be killed and if he usurps money alone, he is to be amputated from opposite ends. If he terrorizes the wayfarer without killing or taking property, he is to be exiled.

Al-Shāfi'ī's primary loyalty is not even to a just ruler. Rather, his loyalty is to the legal order and the rule of law. This meant that even a just ruler may not be given unqualified or unlimited support. In one passage, for example, al-Shāfi'ī argues that the *bughā* are not to be considered equal to bandits, murderers or fornicators. All of these are criminals and, legally, are to be treated as such. Rebels are a different category altogether. There is no legal penalty for rebellion, and the rebel is fought only because of the necessity of maintaining order and stability. In other words, fighting a rebel is a necessary evil while punishing a criminal is a legal imperative.[579] It is rather clear that al-Shāfi'ī's arguments, in certain respects, are somewhat novel and original. At one point, for example, he concedes that the way he is presenting his case is without precedent. He states that after explaining his doctrines on rebellion to some jurists, they commented that many of his arguments and cited evidence are unprecedented. Nonetheless, al-Shāfi'ī argues that his positions on the subject are more Islamically supportable, and more logically consistent than the arguments of his opponents.[580] It is not that the basic elements of his argument are without precedent, rather what is original about his thesis is the cohesive and systematic presentation of the case for benevolence towards rebellion. As we argued earlier, his presentation involved a careful construction and ordering of evidence. He distinguishes and, at times, ignores contrary precedent, and then vests his whole argument in the authoritative precedent of the Qur'ānic discourse, and the purported conduct of the companions 'Alī and Abū Bakr. This is not an invention, but it is a creative construction, and it is also how law is argued and formed.

We argued earlier that law develops and changes slowly. It took the legal process about two hundred years to produce a coherent and systematic position on rebels and rebellion, and to respond to the early Islamic experience with civil wars, and to the constant

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[578] Ibid., vol. 6, 152.

[579] Ibid., vol. 4, 225.

[580] Ibid., vol. 4, 223.

challenges to the 'Umayyads and early 'Abbāsids. Most jurists accepted the legitimacy of the 'Abbāsids but they also reserved the privilege of articulating legality to their own culture -- the culture of the jurists. Political legitimacy is not a legal issue, and jurists, as we will see, were willing to concede this point to the rulers. This is exactly why they were willing to recognize the legitimacy of the usurper (*al-mutaghallib*).[581] But beyond legitimacy, the legality of the government's conduct is a legal issue, and this is exactly what caught the attention and interest of the jurists. It will take, however, at least another hundred years before the field of *'aḥkām al-bughā* becomes firmly established, and it will take a few more hundred years before the field is revised and re-argued in order to respond to the Fatimid challenge at the end of the 3rd/9th century, the Buwayhid threat in the 4th/10th century, and especially, the Mongol invasion in the 7th/13th century. Yet, as will be shown, the field is revised in technical increments, and in fairly measured and slow steps.

It is important to note that although *'aḥkām al-bughā* was not uniformly adopted by the 3rd/9th century,[582] the general legal and moral trend had become swayed in favor of a particular treatment of rebels and rebellion. Al-Muzanī (d. 264/877-8), for instance, reiterates many of al-Shāfi'ī's arguments, but he is more precise and to the point. He asserts that the verse on *baghy* clearly indicates that the rebels are not liable for life or property destroyed in the course of their rebellion.[583] The *bughā* are those who refuse to give a right, or to obey the command of the just ruler, and with whom it is not possible for the just ruler to obtain compliance without fighting. However, before being fought, they must be warned and asked about their grievance. If they mention a clear injustice (*maẓlama bayyina*), then the injustice must be redressed. If, however, they complain about a matter susceptible to debate or open to disagreement, they must be commanded to abandon rebellion, and to return to obeying the commands of the just ruler. If the *bughā* refuse, then they may be fought.[584]

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[581] For example, al-Muḥāsibī (d. 243/857) and 'Aḥmad b. Ḥanbal (d. 241/855) accepted the legitimacy of the usurper, see Riḍwān al-Sayyid, *al-'Umma*, 111, 140. However, al-Sayyid argues that those who accepted the legitimacy of the usurper belong to a realistic or pragmatic trend which ignored legality in favor of expediency. I think this misses the point. Jurists are not political theoreticians, and their main concern is establishing an ordered and stable process by which society can be managed. This is done by focusing on technical rules, and not by expounding sweeping and abstract theories of legitimacy.

[582] For example, early Shī'ī sources do not yet uniformly adopt the discourses on *bughā*. Al-Kulaynī (d. 328-9/939), *al-Kāfī*, vol. 5, 51-64, vol. 7, 245-248; al-Ṣadūq (d. 381/991), *Man lā Yaḥḍuruh*, 68-9, mention reports on bandits and highway robbers but do not discuss *baghy* or *bughā*. Al-Ḥurr al-'Āmilī (d. 1104/1693), *Wasā'il*, vol. 11, 55-69, contains extensive reports on the *bughā*.

[583] Abū 'Ibrāhīm Ismā'īl b. Yaḥyā al-Muzanī, *al-Mukhtaṣar* (printed as the final volume of *al-'Umm* by al-Shāfi'ī), 255. On al-Muzanī and his text, see Jonathan E. Brockopp, "Early Islamic Jurisprudence in Egypt: Two Scholars and Their *Mukhtaṣars*," *International Journal of Middle East Studies* 30, no. 2 (1998): 167-182; Calder, *Studies*, 86-104. Again, I note that I disagree with Calder's argument that the text of *al-'Umm* was edited and redacted so that the bulk of the material in *al-'Umm*, or in the *Mukhtaṣar*, represent the cumulative views of generations after al-Muzanī.

Al-Muzanī argues that if a few individuals or a small group rely on an interpretation and rebel, they will be held liable for all life and property destroyed. If a group which does not have an interpretation, kills and usurps property, they are to be treated as bandits or highway robbers.[585] If, however, a group is of a sufficient number or strength, and has an interpretation or belief, it is not to be held liable for life or property destroyed.[586] Al-Muzanī reiterates the view that the rebels are morally superior to common criminals such as murderers or fornicators. Therefore, as a matter of principle, they are not to be treated as criminals, and they are fought for the limited purpose of repelling their harm. Consequently, the least forceful or destructive means must be pursued, and if it is possible to repel their harm by debate and persuasion alone then this is the method that should be pursued. If the rebels wish to live in isolation but do not intend to defy the commands or fight the just ruler, they should be left alone and not fought.[587]

In all circumstances, the fugitive, wounded or prisoner may not be killed. A rebel who surrenders cannot be imprisoned after the battle ends, and may be released before the end of battle if he takes an oath of allegiance in favor of the just ruler.[588] Weapons of mass destruction should not be used unless absolutely necessary such as, for instance, if the rebels use such weapons first. The assistance of unbelievers or those who are willing to pursue the fugitive or kill the prisoner may not be sought against the rebels.[589] Funeral prayers should be performed on the dead rebels, and it is not permissible to crucify, burn or otherwise mutilate the bodies of rebels.[590] Al-Muzanī repeats al-Shāfiʿī's arguments regarding the adjudications and judgments of rebel judges.[591] Nonetheless, his discussion on the jurisdiction of the rebels is of a slightly different emphasis. He argues that traveling merchants, or prisoners held by rebels, are fully liable for offenses committed in rebel territory. In other words, the loyalists have jurisdiction to prosecute such individuals for crimes committed inside rebel territory. Al-Muzanī asserts that since such individuals do not have an interpretation (*ta'wīl*), there is no reason to hold that the loyalists do not have jurisdiction over offenses committed by them outside loyalist territory. Al-Muzanī also argues, however, that the loyalists have jurisdiction to prosecute crimes committed by a rebel against another in rebel territory.[592]

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[584] Ibid., 256.

[585] Ibid., 257.

[586] Ibid., 256.

[587] Ibid., 258.

[588] Ibid., 256-7.

Of course, al-Muzanī is primarily summarizing al-Shāfiʿī's arguments and conclusions.[593] But in doing so, he is also making them more accessible and authoritative.

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[589] Ibid., 257.

[590] Ibid., 257-8. Their heads may not be severed and sent across the land or displayed.

[591] Ibid., 258.

[592] Ibid., 259.

[593] Norman Calder, *Studies in Early Muslim Jurisprudence*, 86-104, argues that the views and opinions contained in al-Muzanī's text, or for that matter, the *Umm* by al-Shāfiʿī, do not properly belong to the authors. Rather, these views were added by later generations of jurists who creatively constructed the doctrines of the school. Calder believes that most of the early texts were the product of an organic growth by which arguments were cumulatively and gradually formulated, redacted and re-constructed by generations of jurists. He bases these conclusions on an analysis of the hermeneutics of the text. This is not the place to respond to Calder's problematic claims. Calder's analysis and conclusions are highly speculative, and often without foundation. His methodology is entirely subjective, and rather haphazard. He examines particular passages, decides whether they make sense to him, and whether he thinks they represent an advancement in legal thought. If he decides that there are contradictions, tensions or retreats in the text, he considers this as evidence of the text's organic growth. However, Calder's understanding of legal history, legal text and the very idea of legal doctrine is very problematic. Calder's attempt at dating early legal texts is entirely unpersuasive, and, therefore, I have not relied on it.

It is difficult to assess how much influence al-Muzanī's *Mukhtaṣar* had in propagating al-Shāfi'ī's views, but as we saw earlier, Ibn Taymiyya directs most of his criticism at the widespread use of hornbooks (such as the *Mukhtaṣar*), which in his view, are largely responsible for the propagation of the doctrines of *'aḥkām al-bughā*.

One of the rather interesting indications of the influence of this discourse in the 3rd/9th century comes from the Mu'tazilī writer al-Jāḥiẓ (d. 255/869). Al-Jāḥiẓ argues that all the groups, except the Mu'tazila, adopted erroneous positions on the matter of fighting the *bughā*. The Khawārij, he argues, adopted the position that the *bughā* are to be treated as unbelievers, and therefore, their fugitive, wounded and prisoner may be killed or enslaved, and their property may be confiscated.[594] Meanwhile, he contends, the Murji'a held that the *bughā* should not be fought at all. The Mu'tazila, on the other hand, adopted the moderate, and the only correct position. The Mu'tazila argued that one should not seek to slaughter the *bughā*, and that they are to be fought for the limited purpose of repelling their harm. Their fugitive may not be pursued, and the wounded and prisoner may not be killed. The *bughā* may not be enslaved and their property may not be confiscated.[595] Al-Jāḥiẓ, however, is being disingenuous. It is clear that by his time, the views which he espouses and claims to be exclusively Mu'tazilī, have been adopted and advocated by several jurists. Nonetheless, it is rather telling that al-Jāḥiẓ cites the doctrines which advocate the tolerant treatment of rebels as proof of the superiority of his theological school over others. Clearly, the discourses on rebellion had achieved a rather significant status. They had become a part of the moral framework by which righteousness and legality are measured.

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[594] The Khawārij considered their opponents to be the real *bughā*.

[595] Al-Jāḥiẓ, "Risāla fī al-Ḥakamayn wa Taṣwīb Amīr al-Mu'minīn 'Alī b. Abī Ṭālib fī Fi'lih," in *Rasā'il al-Jāḥiẓ: al-Rasā'il al-Siyāsiyya*, 380-381.

THE ISLAMIC LAW OF REBELLION:

The Rise and Development of the Juristic Discourses on Insurrection, Insurgency and Brigandage

Volume Two

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CHAPTER 4

THE SPREAD OF THE ISLAMIC LAW OF REBELLION: FROM THE 4TH/10TH TO THE 5TH/11TH CENTURIES

Adoption and Change in the Juristic Culture

Abū al-Ḥasan al-'Ash'arī (d. 330/941), the founder of the 'Ash'arī theological school of thought, recites a long list of rebellions in the first two centuries of Islam, and he characterizes some rebels as good, and others as bad.[596] He makes a point of mentioning that many rebellions ended in clemency or pardon, and concludes his recital by emphasizing that 'Alī fought those who fought him, but whenever he was asked for a guarantee of safe conduct or amnesty (*al-'amān*), he freely granted it.[597] The idea that Muslim rebels should be treated with a degree of tolerance and with clemency was increasingly taking hold in the culture of jurists. Whether this was a reflection of the socio-historical experiences of Muslims after the 3rd/9th century is doubtful. Rather, it reflects a doctrinal normative allegiance which had taken hold in Muslim juristic culture. Once legal precedent is set, and the legal culture becomes institutionalized and developed, often legal doctrines assume a life of their own. These legal doctrines set their own base of authority and their own doctrinal imperative. Jurists borrow doctrines from each other, and repeat such doctrines simply because they are a part of an established legal discourse within the juristic culture. Nonetheless, changing sociological and political circumstances, cumulatively and eventually, affect juridical discourses and result in incremental modifications to the law. Sociological and political changes also occasionally result in legal revolutions through which the legal doctrines are substantially and materially altered. Such legal revolutions often occur under circumstances of social and political crises that emphasize the fact that a wide gap exists between the social and political realities, and the law. Often, however, these legal revolutions are initiated by political institutions who are outsiders and alien to the juristic culture, or by jurists who are exceptionally creative, but often not well-integrated in the institutional juristic structures. This results in something of a paradox. On the one hand, the substantial modification of the law might be responsive to the social and political circumstances of society. On the other hand, the fact that the juristic revolutions are often initiated or advocated by relative outsiders to the juristic culture limits the effectiveness of such legal changes. Since a developed juristic culture relies on, and is encumbered by, prior authority, advocating changes that are not consistent with prior authority inevitably meets resistance. This is especially the case if the changes are advocated by those who do not comfortably fit within the institutions of the juristic culture.

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[596] Al-'Ash'arī, *Maqālāt*, vol. 1, 136-165.

[597] Ibid., vol. 1, 212.

In this chapter we will observe a two-pronged phenomenon: first, the continued development and widespread adoption of the doctrines of the Islamic law of rebellion, and second, the advocacy by some jurists for a major re-articulation and reformulation of this law. We will discuss the legal discourses on the law of rebellion through the weakening and fragmentation of the ʿAbbāsid dynasty around the 4th/10th century, the beginning of the Bāṭinī threat, and the end of the Fāṭimid threat in the 5th/11th century. Although the historical circumstances of this period were materially different from the circumstances of the 2nd/8th and 3rd/9th centuries, Muslim jurists of the 4th/10th and 5th/11th centuries did not respond to their contemporary reality as much as they responded to paradigms set by the juristic culture. Shāfiʿī jurists consolidated and expanded upon the doctrinal and theoretical foundations of the law of rebellion. They sought to further authenticate the basis of this law by bolstering the evidence of its Islamicity, and by developing its systematic structure. Ḥanbalī jurists borrowed and adopted the Shāfiʿī discourses, but did not contribute to the theoretical or doctrinal development of the law until a few centuries later.

Ḥanafī jurists participated in bolstering the authenticity of the law of rebellion, but their doctrines continued to be less tolerant towards rebels. Although Mālikī jurists increasingly acknowledged the existence and spread of the discourse on rebellion, they continued to treat the topic with substantial ambivalence. Significantly, Shī'ī jurists responded to the Sunnī legal discourses on rebellion but from a decisively different ideological perspective.

In all of these cases lawyers were imitating lawyers, and lawyers were responding to lawyers. This meant that the law could develop along systematic and coherent theoretical categorizations unencumbered by the vagaries of socio-political realities. The distinction between rebellion and banditry would become sharper and clearer. Furthermore, eventually Muslim jurists would break down their analyses into three distinct questions: One, who is a rebel? Two, what is a rebellion? Three, how should rebels be treated? Effectively, by the 5th/11th century the discourses on rebellion became not only firmly established but even formulaic. Such discourses increasingly assumed a rather objectified and detached tone.

Nonetheless, the cumulative effect of the socio-political changes in the Islamic world after the 6th/12th centuries would result in thorough revisions in the law of rebellion. The changes are rather elusive, and if one is not observing the development of the legal discourses over the span of several centuries, such changes could be easily missed. The categorizations and the basic structure of the law remained unchanged. Nonetheless, the definitions and usages of the legal terms were revised and substantially altered. While the external structure of the law appeared unchanged, the substantive interior was slowly altered and restructured to produce materially different results. However, as noted above, this would take place post-6th/12th century. For now, it is important to describe the adoption and consolidation of the law of rebellion. This meant that this field of legal discourse developed from its fairly obscure and vague beginnings to a systematic and permanent field of law.

The Consolidation and Spread of a Legal Tradition: The Shāfi'ī and Ḥanbalī Advocacy

Shāfi'ī jurists insisted that, as a general proposition, the ruler must be obeyed. They also accepted the necessity of obeying the usurper of power. However, as argued earlier, this is rather unremarkable. The general legal principle espoused by the jurists was in favor of a system of basic order. As argued by al-Ghazālī and others, without a foundation of order, the possibility of justice would be denied. Nonetheless, the adherence to this general principle was not as dogmatic or slavish as much contemporary scholarship assumes. Rather, the general principle was permeated with the qualifications and complexities of the doctrines of rebellion. Through these doctrines, Shāfi'ī thought especially refused to grant the state an absolute, unmitigated right to obedience.

The most notable Shāfi'ī exposition on the law of rebellion emerging from the 4th/10th and 5th/11th centuries is that of al-Māwardī (d. 450/1058). Al-Māwardī served as a judge in several cities in Iraq before being given the honorific title of *'aqḍā al-quḍāh* (the most eminent judge) by the 'Abbāsid caliph al-Qā'im bi 'Amrillāh (r. 422/1031 - 467/1075). Al-Māwardī also often acted as a political emissary and negotiator on behalf of the 'Abbāsid caliph. There is no question that al-Māwardī had a vested interest in the political institutions of his day. As noted earlier, Gibb argued that al-Māwardī wrote his famous book on the ordinances of government in an attempt to assert the authority of the 'Abbāsid caliphs against the Buwayhid princes who effectively dominated and controlled the 'Abbāsids. Yet, he enjoyed a close relationship to the Buwayhid ruler of Baghdād, the prince Jalāl al-Dīn (r. 416/1025 - 434/1042). Nevertheless, al-Māwardī was not simply subservient, and his character and intellectual legacy were complex. He apparently harbored Mu'tazilī sympathies and adopted some of their views on predestination and other points of creed. Perhaps because of his Mu'tazilī inclinations and his political role, al-Māwardī also reportedly hid most of his writings during his lifetime, and permitted their publication only on his deathbed. His political role was not free of tensions. For example, when the 'Abbāsid caliph granted Jalāl al-Dīn the title of "king of kings," al-Māwardī issued a *fatwā* asserting that the title was improper, and that the act of the 'Abbāsid caliph was illegal.[598]

Clearly, al-Māwardī had no qualms with the necessity of obeying those in power. But his position is not absolute nor dogmatic. For instance, in his book *Naṣīḥat al-Mulūk* (Advice to the Kings), he reiterates al-Shāfi'ī's view that rebels against unjust rulers should not be fought.[599] Elsewhere, al-Māwardī also cites al-Shāfi'ī's opinion that only those who oppose the just ruler are to be considered rebels.[600] However, al-Māwardī does not emphasize this point, and does not seem to be primarily concerned with whether the ruler is just or not. Rather, he quotes al-Shāfi'ī's opinions on this matter without further elaboration. Al-Māwardī's main emphasis is on the treatment due to rebels and not the legitimacy of the ruler. His treatment of the issue of rebellion is very systematic and exhaustive, and even, perhaps, over-developed. In fact, some of the finer points of his argument were not adopted by later Shāfi'ī jurists. But what emerges from his treatment of the topic is a refined and complex discourse that is neither absolute nor dogmatic. Al-Māwardī does not focus his discussions on the right of rebellion against unjust rulers. Rather he focuses on the categorization of rebellion according to specific criteria and standards. He goes as far as maintaining that if rebels fulfill specific criteria, they are not to be considered sinners but they are equivalent to those who adopt a legitimate school of thought (*madhhab*). In the same way that one may legitimately change from the Shāfi'ī school of thought, for example, to another school of thought, rebels could alter their initial commitment to a loyalist ideology to an oppositional ideology without being branded as iniquitous (*fasaqa*).[601]

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[598] See al-Dhahabī, *Siyar*, vol. 18, 64-66; Ibn Khallikān, *Wafayāt*, vol. 3, 282-283; Ibn al-'Imād, *Shadharāt*, vol. 3, 285-287; al-Māwardī Abū al-Ḥasan 'Alī b. Muḥammad b. Ḥabīb, *'Adab al-Qāḍī*, ed. Muḥyī Hilāl al-Sarḥān (Baghdād: Maṭba'at al-'Irshād, 1971), vol. 1, 37-38; Mikhail, *Politics and Revelation*, 62-63.

[599] Al-Māwardī, *Naṣīḥat al-Mulūk*, 462.

[600] Al-Māwardī Abū al-Ḥasan 'Alī b. Muḥammad b. Ḥabīb, *Kitāb Qitāl 'Ahl al-Baghy min al-Ḥāwī al-Kabīr*, ed. Ibrāhīm b. 'Alī Ṣandaqjī (Cairo: Maṭaba'at al-Madanī, 1987), 102.

Al-Māwardī starts his analysis by invoking the *baghy* Qur'ānic verse. While he notes the ambiguous nature of the verse and the obscure reasons for its revelation, he is able to draw specific conclusions from the verse. He argues that the verse has several clear indications: 1. the rebels are to be considered Muslim and treated as such; 2. reconciliation and peaceful resolution of the conflict is always preferable to fighting; 3. fighting the rebels is permissible if they persist in their defiance; 4. if they repent, the rebels may not be fought; and 5. the fighting parties are not liable for damages incurred. Thus, al-Māwardī argues the law of rebellion was clearly founded on the Qur'ānic text.[602] By extracting these principles from the Qur'ānic verse, al-Māwardī laid a powerful foundation for his discourse. Importantly, al-Māwardī goes further by arguing that the laws of rebellion were firmly established on the precedent set in the *Sunna* of the Prophet and the companions. Al-Māwardī mentions the traditions attributed to the Prophet concerning the impermissibility of departing from the *jamā'a*, and the traditions condemning those who use force against fellow Muslims. Interestingly, however, al-Māwardī does not invoke these traditions in the context of discussing the permissibility of rebellion. Rather, he argues, these traditions relate to the issue of whether the rebels may be fought. Therefore, these traditions are not addressed to the rebels; they are addressed to the loyalists, and they authorize the use of force against rebels if need be.[603] These traditions, according to al-Māwardī, do not necessarily condemn rebels, but simply permit the waging of war against rebels. Al-Māwardī goes on to conclude that the Qur'ān, the *Sunna* of the Prophet and the companions, and the consensus of the jurists permit the fighting of rebels.[604] Essentially, al-Māwardī achieves two objectives by this argument, the first theological and the second legal. From a theological point of view, 'Alī was right in fighting those who rebelled against him. In this context, al-Māwardī considers Mu'āwiya to have been a rebel, and 'Alī to have been the legitimate ruler.[605] From the legal point of view, the necessity of sustaining order and stability is maintained.

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[601] Ibid., 180.

[602] Ibid., 62.

[603] Ibid., 63-64.

[604] Ibid., 66-67.

Since it has been established that fighting rebels is permissible, al-Māwardī argues, it must also be recognized that there are four conditions that must be fulfilled before fighting rebels may be considered lawful. According to al-Māwardī, three of these conditions are agreed upon while there is disagreement concerning the fourth condition. First, the rebels must be of a sufficient number and strength so that it becomes impossible to obtain their compliance with the law without fighting. But at the same time, if the rebels are few in number, they cannot be fought. Rather, they are to be treated as any other subject of the state. Second, the rebels must gather in an area or locality so that they become distinct and separate from the rest of the population. Otherwise, they may not be fought. Third, the rebels must adopt an interpretation or ideology that is plausible but not necessarily correct. If the rebels do not have an interpretation, they are to be considered bandits or highway robbers, and they should be treated as such. Finally, al-Māwardī asserts that the jurists have disagreed on whether it is necessary that the rebels have a leader who the rebels follow and obey (*wujūd muṭā'*). Some have argued that as long as the rebels have not chosen a leader, they may not be fought. Al-Māwardī, however, disagrees with this view and maintains that choosing a particular leader is not a valid condition for fighting the rebels.[606] In other words, the rebels may be fought even if they have not chosen a leader. If all three conditions have been met, a *prima facie* case has been established for the permissibility of fighting the rebels. The ruler must then move to the next step, and that is warning and debating the rebels. Fighting must be a last resort, and may be invoked only if the ruler has despaired of achieving a peaceful resolution to the conflict. After all efforts at a peaceful resolution have been exhausted, it becomes permissible to fight the rebels. Al-Māwardī bolsters his argument with various citations to the reported conduct of 'Alī.[607]

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[605] Ibid., 66, 89, 93. In this context, the author notes that one may not argue that 'Uthmān refused to fight the rebels, and hence, fighting rebels is impermissible. Al-Māwardī simply notes that every age has its appropriate laws, and every *mujtahid* may have a different opinion. The implication is that 'Uthmān was entitled to his view, and that his view may have been appropriate for his day and age. Al-Māwardī implies that 'Uthmān's views need not be followed in a subsequent age.

[606] Ibid., 67-69. The disagreement over whether the rebels must have a leader relates to the issue of what makes a separate community and the role of leadership. Some argued that as long as the rebels have not accepted an alternative leader, they, effectively, remain a part of the community of the loyalists. In other

In a segment that exhibits a tendency towards over-legislation, al-Māwardī argues that after exhausting the avenues of a possible peaceful resolution, there are circumstances under which fighting the rebels becomes obligatory, permissible, or disagreed upon. The ruler *must* fight the rebels in one of five conditions: 1. If the rebels assault loyalist women;[608] 2. If the rebels interfere with the state's war efforts against external enemies; 3. If the rebels usurp money or property from the public treasury; 4. If the rebels refuse to pay taxes; and 5. If the rebels attempt to overthrow the ruler by force.[609] In any of these five circumstances, the ruler must wage war against the rebels and bring them back to the fold.

Fighting the rebels is permissible but not mandatory if the rebels conspire, organize and gather in a location, and exhibit an intent to rebel, but have not yet violated any law or abstained from performing any duty owed to the state. The ruler, nonetheless, may fight them to pre-empt their rebellion, but it is not obligatory that he do so. In this situation, the rebels have not violated any particular law, but they have renounced the leader, and considered themselves to be in an effective state of rebellion. Al-Māwardī distinguishes

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words, groups do not become separate until they establish a different leader and pay allegiance to him. At heart of this debate is whether a group is in a state of actual rebellion if it has not adopted an alternative leader.

[607] Ibid., 70-73, 75.

[608] The phrasing in the original text indicates that al-Māwardī had in mind a situation where the rebels attack travelers and commit rape.

[609] Ibid., 75. Note that al-Māwardī does not say "the just ruler."

between this situation, and a situation where a group of people adopt a specific system of belief, live in peaceful isolation from society, and do not exhibit an intent to rebel or overthrow the ruler. He argues that this group may not be fought even if they adopt a system of belief considered objectionable to the loyalists, and they may not be forced to abandon their system of belief.[610] Finally, the last category that al-Māwardī discusses is that of rebels who gather in a specific location, but are otherwise obedient except for the fact that they refuse to give their alms (*zakāh*) to the ruler. Rather, they insist on distributing it to their sympathizers instead. One can legitimately contend that they *must* be fought or that they *may* be fought. In other words, both views are supportable.[611]

As to the issue of liability, the rebels are liable for life and property destroyed before or after the fighting. Importantly, al-Māwardī argues that the loyalists are liable, as well, for life destroyed before or after the commencement of fighting. As to rebel property destroyed before or after the fighting, as a general matter, the loyalists are to be held liable. If, however, a particular individual stands accused of destroying rebel property before or after the fighting, liability will turn on the subjective intent of the offender. If the offender intended to contribute to weakening and defeating the rebels, he will not be held liable. Nonetheless, if the offender was motivated by malice and a desire to exact vengeance, he will be held liable. Importantly, neither the loyalists nor the rebels are liable for life or property destroyed during the fighting. Al-Māwardī argues that there are two reasons why the rebels should not be held liable for life or property destroyed in the course of fighting. One, the rebels based themselves on an interpretation, and this distinguishes them from common criminals. Two, the rebels must be encouraged to return to obedience, and if they are to be held liable, this is due to alienate them further and not provide them with a sufficient incentive to end their rebellion.[612]

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[610] Ibid., 77, 106-107, 120.

[611] Ibid., 77.

[612] Ibid., 79-87.

Al-Māwardī goes on to emphasize that if the rebels are few in number, and do not possess a particular force or strength, they are to be treated like any other subject of the state. If they co-mingle with the loyalists, as long as they do not break the law, they are not to be persecuted. However, if they break the law, they are to be held responsible for their actions on an equal footing with anyone else. Al-Māwardī cites the example of Ibn Muljim, the man who assassinated 'Alī, and argues that although he was motivated by an interpretation, he was punished nonetheless. Importantly, al-Māwardī emphasizes that 'Alī, on his death bed, not only commanded that Ibn Muljim *not* be tortured, but he also urged that Ibn Muljim be treated well and that he be pardoned.[613] Al-Māwardī does not go as far as arguing that every political assassinator should be pardoned. Nonetheless, he does insist that political prisoners be treated kindly, and recommends pardon as the pious or religiously preferable course of action, even if the assassinator does not technically qualify for *bughā* treatment.[614]

In all circumstances, al-Māwardī insists it must be remembered that rebels are not fought because of their ideas or systems of belief. God permitted the fighting, and not the killing, of rebels. Killing is merely incidental to the necessity of fighting. Therefore, once the rebellion ends, the permission to fight or kill ends. Al-Māwardī argues that, as a legal matter, the rebellion is considered to have ended in three circumstances. One, if the rebels renounce the rebellion and declare their willingness to obey the ruler; two, if the rebels lay down their weapons; and three, if the rebels are defeated and flee the battle field. In any of these three situations, the rebellion has ended, and the loyalists no longer have legal cause to fight or kill the rebels.[615] It makes no difference, al-Māwardī contends, whether or not the rebels have a group or camp to which they may return. The moment one of the three situations exists, the fighting must end and the rebels may not be pursued or finished off.[616]

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[613] Ibid., 104. Typically, the reports on this incident state that 'Alī said that he would decide Ibn Muljim's fate if he ('Alī) lives, but his son should execute Ibn Muljim if he dies. Al-Mawardī's report is rather unusual.

[614] Ibid.

[615] Ibid., 109

Al-Māwardī then addresses the Khawārij specifically. He explains that the Khawārij believe that all Muslims who do not adhere to the Khārijī creed are infidels, and that the abode of Islam is really an abode of unbelievers. Therefore, the Khawārij permit the killing and usurpation of the properties of their opponents. If a group appears, al-Māwardī argues, that adopts a similar set of beliefs, they may not be persecuted or fought as long as they live among Muslims and do not commit a specific crime. Furthermore, they are not to be compelled or forced to abandon their beliefs. Rather, the ruler must attempt to debate them and convince them of the error of their ways. Like the Prophet's practice with the hypocrites of Medina, they cannot be prosecuted simply because of their ideas, as long as they outwardly continue to obey the ruler.[617] If this group isolates itself from the rest of society, and lives in a specific territory, their area is to be treated as a part of the loyalist territory (*dār ahl al-ʿadl*), and therefore all laws continue to apply to them without distinction.[618] If a member of the group commits a crime, only the offender, and not the group as a whole, is to be prosecuted for the crime.[619] However, if the group claims collective responsibility for the crime, and protects and gives shelter to the offender, then the whole group may be fought until the offender is captured.[620] The implication of al-Māwardī's argument is that even a fanatic group such as the Khawārij may not be persecuted unless they commit a general act of insurrection, and that ideas alone are not sufficient grounds for commencing warfare against a group adhering to a radical ideology. Individuals belonging to the group are to be held individually responsible for their crimes, and therefore, individual acts of violence do not justify a disproportionate violent response by the state. Importantly, like other rebels, the Khawārij or a group adhering to a similar system of thought, are not liable for life or property destroyed in the course of a general rebellion.[621]

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[616] Ibid., 109-117.

[617] Ibid., 120.

[618] Ibid., 123.

[619] Ibid., 126. Al-Māwardī discusses whether if the offender commits a murder he must be executed, as in the case of a bandit, or whether the offender is to be treated as any other common criminal. In other words, if a fanatical offender who belongs to a group such as the Khawārij commits murder, does it become imperative to impose the death sentence or is he to be treated just as any other criminal would be treated? He does not resolve the issue.

[620] Ibid., 127.

After the digression dealing with fanatical groups such as the Khawārij, al-Māwardī returns to the issue of the treatment of rebels in general. He pays special attention to the rules of conduct of warfare against rebels. Although he repeats many of al-Shāfi'ī's points, his treatment is more exhaustive and systematic. He, like al-Shāfi'ī, maintains that the wounded and fugitive may not be killed and weapons of mass destruction may not be used against rebels. Mangonels and flame throwers may not be used except for an absolute necessity, for example, if they are first used by the rebels. Al-Māwardī, however, adds that the rebels may not be attacked without warning or under the cover of darkness. The rebels' homes may not be burned or drowned, and the rebels themselves may not be surrounded and denied food or water. The cattle, war horses, trees or crops of the rebels may not be destroyed.[622] Furthermore, the loyalists may not seek the assistance of non-believers, scriptuaries or those who believe that it is proper to dispatch the wounded and fugitives (as is the case with the Ḥanafī's) against the rebels. If it becomes necessary to use any of these groups against the rebels, the loyalists may do so but only if certain conditions are met. First, the loyalists must find no other ally against the rebels. Second, the loyalists must obtain an assurance from their allies that they will not kill the wounded or fugitive, and the loyalists must have a good faith belief that the allies will in fact comply with such an assurance. Third, the loyalists must be capable of restraining their allies from violating the assurance given or committing any other abuses. If the loyalists do not have the power to do so, then they may not seek the assistance of these allies.[623] Hence, even if it becomes necessary to use the allies, it is imperative that the loyalists be able to insure compliance with the dictates of legality.

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[621] Ibid., 124.

[622] Ibid., 164-165.

Al-Māwardī reiterates that the property of rebels may not be confiscated. Weapons and supplies captured from the rebels are not to be used against them, and are to be returned to the rebels after the fighting ends. The weapons and supplies, however, may be used in cases of dire necessity. If such weapons and supplies are used or destroyed, adequate compensation must be paid to the rebels.[624] Furthermore, money should not be accepted from the rebels in return for a peace treaty or in return for releasing rebel prisoners. Attempting to force rebels to ransom their prisoners from the loyalists is improper. Furthermore, even if the loyalists illegally take hostages from the rebels, these hostages may not be killed even if the rebels kill loyalist hostages.[625]

Al-Māwardī dedicates a considerable amount of attention to the treatment due to rebel prisoners of war. After asserting that rebel prisoners may not be executed or enslaved, he notes that the Ḥanafī position allows for the execution of prisoners as long as the fighting between rebels and loyalists continues. He, however, rebuts the Ḥanafī position by citing a report attributed to the Prophet specifying that rebel prisoners may not be killed. It is rather apparent that the Prophet's *ḥadīth* is the product of late circulation since it does not appear in any of the earlier juristic sources. Nonetheless, al-Māwardī further supports his argument by claiming that 'Alī never executed rebel prisoners, and that Muslims have consistently followed his example ever since (*wa 'alayhā 'amila al-Muslimūna ba'dahu*). Al-Māwardī's claim is hardly historical, however, he argues that the treatment of Muslim rebels must materially differ from the treatment afforded to non-

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[623] Ibid., 158.

[624] Ibid., 209. Compensation need not be paid to the rebels if the loyalists do not use the weapons and supplies, but they are destroyed or lost anyway through no fault of the loyalists.

[625] Ibid., 141, 166-167.

Muslim prisoners of war. Therefore, he goes so far as to claim that whoever executes a rebel prisoner either should be put to death or should be liable for the victim's blood money.[626]

Since it is forbidden to execute or enslave rebel prisoners, al-Māwardī asserts, then the only other possibility is imprisonment. Rebel prisoners may be imprisoned as long as the fighting continues. However, if the rebels during the continuation of the fighting give their oath of allegiance to the ruler, their oath must be accepted, and they must be released immediately. It is not permissible for the ruler to demand hostages or other forms of surety as a condition for their release. The rebels' word must be accepted at face value, and no attempt should be made to investigate possible hidden motives or intentions that the rebels might harbor.[627] If the rebels refuse to give their oath of allegiance to the ruler, they are to be detained until the fighting ends, but then they must be released promptly. Al-Māwardī asserts that the fighting is considered to have ended in three specific situations: 1. If the rebels, as a group, abandon their rebellion and declare their intention to take the oath of allegiance to the ruler; 2. If the rebels, as a group, surrender and lay down their weapons; or 3. If the rebels are defeated and flee from the battle field.[628] If any of these situations exists, al-Māwardī argues, then the fighting must be considered to have come to an end. Al-Māwardī, however, notes that some have argued that, as to the third situation, if the rebels retreat to a standing war camp or have available reinforcements, the prisoners may continue to be detained until the war camp or the reinforcements have been defeated. Importantly, al-Māwardī notes that once the rebel prisoners have been released, they are to be treated as any other subjects of the state even if they continue to adhere to the system of thought that prompted their rebellion in the first place, or even if they isolate themselves from society.[629]

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[626] Ibid., 129-131.

[627] Ibid., 132.

[628] These conditions are substantially the same as the three conditions under which Al-Māwardī argues that a rebellion is considered to have ended, and legal cause no longer exists for killing the rebels.

As noted earlier, al-Māwardī does not focus on the theological or theoretical status of the rebels. He does not systematically or cohesively explain why rebels are entitled to this rather generous treatment. Other than stating that Muslim rebels are not sinners and that they must adhere to a plausible interpretation or cause, he does not produce a systematic justification for the tolerant treatment of Muslim rebels. Furthermore, al-Māwardī does not reproduce earlier opinions which asserted that rebels who are motivated by tribal or partisan justifications are not to be treated as *bughā*.[630] Therefore, it is not clear who al-Māwardī specifically had in mind when he addressed the category of the *bughā*. For instance, it is not clear whether al-Māwardī considered certain Buwayhids or Seljuks who might have not recognized the 'Abbasid caliph or given such caliph allegiance to be *bughā*.[631] Nonetheless, it is clear that al-Māwardī sought to give *'aḥkām al-bughā* an expansive reach, and to create an ethical and legal standard that would influence the conduct of warfare between combating Muslims, and a standard under which rulers may be judged. Like al-Shāfi'ī, al-Māwardī is not willing to extend the full protections of *'aḥkām al-bughā* to non-Muslims living in Muslim territories. However, he is not willing to place them outside the scope of these laws either. He, for example, argues that under normal circumstances if *ahl al-dhimma* assist or join the *bughā* in rebellion, this will not be considered a violation of their covenant (*'aqd al-dhimma*). But if these non-Muslims join Muslim rebels, and claim that they did not know that they were not supposed to do so they should be believed and their covenant remains valid. For instance, if the non-Muslims assert that they thought it was permissible to assist the rebels in the same fashion that it is permissible to join Muslims in fighting bandits, then this is to be considered a valid excuse. In other words, it is well-established, according to al-Māwardī, that non-Muslims may assist Muslims in fighting bandits. Hence, if the non-Muslims claim that fighting with the rebels is not distinguishable from fighting against bandits, this will serve as a valid excuse, and the integrity of their covenant with the loyalists will be preserved. Of course, this is not entirely convincing. Logically, one can hardly see a correlation between fighting bandits and fighting the state. But al-Māwardī wishes to uphold the view that *ahl al-dhimma* should not be treated harshly simply because they joined a rebellion. In fact, in this situation the rules of conduct that apply to fighting Muslim rebels also apply to fighting *ahl al-dhimma* except that *ahl al-dhimma* will be held liable for life and property destroyed in the course of the rebellion. If the loyalists, however, make it a condition of *'aqd al-dhimma* that the *ahl al-dhimma* not fight any Muslim, in that case, assisting or joining a rebellion will be considered an abrogation of the covenant.[632]

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[629] Ibid., 135.

[630] However, the Shāfi'ī jurist al-Kiyā al-Harrāsī (d. 504/1110), *'Aḥkām al-Qur'ān*, vol. 3, 382, argues that the prohibition against becoming involved in *fitan* applies to those who fight out of tribal and partisan reasons. This implies that those who fight while relying on a *ta'wīl* are considered qualitatively different.

[631] Arguably, however, the Seljuks or Buwayhids lacked an interpretation or *ta'wīl*, and therefore, should not be treated as *bughā*.

The rebels, according to al-Māwardī, remain Muslim despite their rebellion, and in fact, are not sinners. Therefore, al-Māwardī insists that, contrary to the Ḥanafī position, funeral prayers should be performed on dead rebels. He also notes that the jurists have disagreed on whether loyalists killed in battle are martyrs but he implies that, in fact, they are not.[633] Al-Māwardī adds that the testimony of rebels should be accepted in court because the mere fact that they participated in a rebellion does not impeach their credibility. There are, however, two exceptions to this rule. If the rebels believe that all Muslims are in reality unbelievers, and consider that spilling the blood of their opponents is permissible, then their testimony should not be accepted because this type of belief is sinful and iniquitous. Furthermore, if the rebel adheres to the views of groups such as the

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[632] Ibid., 147-149.

[633] Ibid., 184. A martyr in Islamic law is not washed before burial. Al-Māwardī states that loyalists killed in battle are to be washed and buried just as is done for the rebels. Therefore, he implies that loyalists killed in battle are not martyrs.

Khaṭṭābiyya, his testimony should not be accepted. The Khaṭṭābiyya believed that it was permissible to testify falsely in order to support the claims of one of their own members against their opponents.[634]

Thus far, al-Māwardī deals mostly with rebels that are in the process of rebellion or whose rebellion ultimately failed. He argues throughout that the territory of the rebels remains a part of the abode of Islam, and that the rebels remain the subjects of the ruler. But al-Māwardī also deals with the situation in which the rebels are temporarily or permanently victorious. In this context, he uses the expression "the abode of rebels" (*dār al-baghy*) juxtaposing it to "the abode of the loyalists" (*dār ahl al-ʿadl*).[635] Al-Māwardī implies, without ever explicitly conceding as much, that these are two different and separate abodes, but he does not treat the two abodes as equals. The abode of the loyalists remains the possessor of legitimacy, while the abode of the rebels is given limited recognition. Following in al-Shāfiʿī's footsteps, he argues that if the rebels manage to prevail over a specific territory, collect taxes and implement sanctions against criminals, their legal acts and adjudications must be given full effect if the ruler eventually defeats them.[636] Furthermore, the decisions of judges appointed by rebels in unconquered rebel territory must be given full faith and credit by loyalist judges. Since it has already been established that, contrary to the Ḥanafī position, rebels are not sinners or iniquitous, there is no reason to refuse to give full effect to the adjudications of rebel judges. There are, however, two exceptions. First, if the judge's decision violates the clear consensus of all jurists, then his decision should not be recognized. Second, if the judge appointed by the rebels believes that all other Muslims are unbelievers, his decision must not be recognized regardless of whether it is supportable or not.[637] Additionally, if the rebel judge writes a letter to a loyalist judge, al-Māwardī recommends that the loyalist judge delay in writing a response basically as a sign of disrespect and disregard.[638]

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[634] Ibid., 179-181. See on the Khaṭṭābiyya, al-Shahrastānī, *al-Milal wa al-Nihal*, vol. 1, 210-211.

[635] See, for example, Ibid., 213-216.

[636] Ibid., 169.

[637] Ibid., 174-176.

Importantly, peace treaties signed by the leader of the rebels with non-Muslims should not be recognized. The power to enter into treaties with foreign powers is a privilege reserved to the leader of the Islamic community who is the ruler of the loyalists. Nonetheless, any guarantee of safe conduct given by rebels to non-Muslims must be respected and given full effect.[639] Nevertheless, al-Māwardī strongly disagrees with the Ḥanafī jurisdictional argument. He argues that Islamic law has jurisdiction over offenses committed by loyalists or rebels in the abode of the rebels. Like al-Shāfiʿī, al-Māwardī argues that Islamic law has personal jurisdiction over Muslims wherever they may go, even in non-Muslim territory. Therefore, if a Muslim violates God's laws in the abode of unbelievers or in the abode of rebels, jurisdiction is maintained over all such crimes. Significantly, al-Māwardī does not argue that the loyalists have extra-territorial jurisdiction over all offenses committed outside their territory. Rather, al-Māwardī's argument is that the laws of Islam and God apply everywhere. Consequently, for example, the obligation to pray and fast applies to Muslims wherever they may go. The issue, al-Māwardī contends, is not whether the ruler maintains control over a specific territory. The relevant issue is that God commands Muslims to observe certain prohibitions and injunctions. The ruler is simply delegated to apply God's commands. Therefore, if the ruler is able to apply the Divine commands to any Muslim, he must do so. If, however, the ruler is unable, under certain circumstances, to apply the Divine commands, then the application of the commands are deferred until he is able to do so.[640] Consequently, the issue has little to do with the abode of the rebels specifically. The real issue is that Islamic law has universal jurisdiction over all Muslims regardless of the nature of the territory.

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[638] Ibid., 177.

[639] Ibid. 203-204, 210-211.

[640] Ibid., 213-216.

It is difficult to evaluate or characterize the nature of al-Māwardī's lengthy discourse. His exhaustively detailed treatment does not seem to be inspired by a simple or essentialistic ideological motivation. Significantly, however, one cannot describe al-Māwardī's discourse as either quietist or activist. He does not unequivocally condemn or endorse rebellion against those in power. He recognizes that those who sincerely believe that they have just cause to rebel must not be treated as common criminals. Yet, he also upholds the need for law and order by supporting the necessity of putting an end to rebellion. Al-Māwardī's treatment is thoroughly legal and technical. But he is neither unabashedly pragmatic nor idealistic, rather he combines elements of both pragmatism and idealism. For example, he pragmatically upholds the need to recognize the legal acts of rebels, but he idealistically argues that captured weapons and other war equipment cannot be used, and must be returned to the rebels.[641] Furthermore, he does not concede sovereignty to the rebels, but he does recognize their limited independence. He clearly prefers that they be integrated in society but rejects the idea of forcible conversion or the instituting of an inquisition against all those who hold Khārijī ideas, for example. Ultimately, al-Māwardī is not writing political theory but elucidating legal rules that embody competing and conflicting values. Many of his assertions are the product of an adherence to the precedents and doctrines of the Shāfi'ī school. But he also exhibits a genuine concern with the need for stability and order without legitimating unrestrained slaughter of rebels. Significantly, in works which he wrote in order to render advice to rulers, he repeats the rules discussed above without substantial difference. In other words, al-Māwardī does not revise his discourse in order to cater to the preferences of a separate audience.[642]

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[641] The issue of the war equipment of the rebels seems to have been a point of considerable concern for Shāfi'ī jurists. Al-Jawharī (d. 350/961), for example, argues that there was consensus among the companions that such equipment not be treated as spoils of war. It is only after the age of the companions that people advocated a contrary position. The implication is that people deviated from the correct Islamic position after the age of the companions. Muḥammad b. al-Ḥasan al-Tamīmī al-Jawharī, *Nawādir al-Fuqahā'*, ed. Muḥammad Faḍl 'Abd al-'Azīz al-Murād (Damascus: Dār al-Qalam, 1993), 175.

Al-Māwardī produced the most exhaustive treatment of the topic of rebellion in his age. Other Shāfi'ī jurists of his time, while repeating many of the doctrines and rules enunciated by al-Māwardī, exhibit different tendencies and preferences. Importantly, these jurists often address the issue of whether rebellion is legal in the first place, which, as has been seen, is largely ignored by al-Māwardī. For instance, Abū 'Isḥāq al-Shīrāzī (d. 476/1083) states outright that it is illegal to rebel against the ruler (*'imām*), and that the *bughā* are those who rebel either seeking the overthrow of the ruler, or refuse to obey his commands while basing themselves on an interpretation or cause (*ta'wīl*). He omits the reference to the just ruler (*al-'imām al-'ādil*).[643] This is probably a recognition of the fact that the use of the term "just" meant the rightful ruler, and not necessarily the ruler who conducts himself justly. As noted earlier, the expression "just ruler" was used by Shāfi'ī jurists in a very ambiguous sense. Al-Shīrāzī dispenses with the expression because it is largely unhelpful in this context. Despite his assertion that rebellion is unlawful, like al-Māwardī, al-Shīrāzī asserts that rebels who rely on a plausible interpretation or cause are to be considered a form of *mujtahids*, and therefore, are not to be treated as common criminals.[644] Otherwise, al-Shīrāzī reproduces most of the rules asserted by al-Māwardī. Rebels are not to be slaughtered, and are not to be held liable for destruction caused in the course of rebellion or fighting. He does mention that some Shāfi'ī jurists had argued that rebels should be held financially, but not criminally, liable for damages caused during the rebellion. Al-Shīrāzī, however, dismisses this argument as contrary to the consensus. He also asserts that both loyalists and rebels are liable for any destruction caused before or after the rebellion.[645] Al-Shīrāzī, like al-Māwardī, distinguishes between rebels and bandits by the fact that rebels have a plausible interpretation or cause. Therefore, al-Shīrāzī states, if a group which does not have a *ta'wīl* prevails over a certain territory, none of their legal acts will be recognized, they will be held responsible for all legal violations committed, and they are to be treated as bandits.[646] This specific point is implicit in al-Māwardī's argument, but al-Shīrāzī makes it explicit, and thus, widens the gap between rebels and bandits. Furthermore, al-Shīrāzī's position on rebel prisoners is somewhat different than al-Māwardī's. He agrees that the prisoners should be released if they give their oath of allegiance to the ruler. But after the battle ends, the prisoners who did not give their allegiance to the ruler are to be released only after they promise not to rebel again. He also adds that if the loyalists kill a rebel prisoner, they are responsible for his blood money which is to be paid to the rebel's family.[647] In the final analysis, however, although al-Shīrāzī explicitly states that it is unlawful to rebel against any ruler, his position on the treatment of the rebels does not differ from al-Māwardī's in any significant respect.

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[642] Most of the discussion above comes from *al-Ḥāwī* which is a jurisprudential work written for jurists. In his discussion in works addressed to rulers and administrators, he reproduces the same arguments but in an abridged form. See al-Māwardī, *al-'Aḥkām*, 72-77; Idem, *Naṣīḥat al-Mulūk*, 460-463.

[643] Al-Shīrāzī, *al-Muhadhdhab*, vol. 2, 279. Al-Baghawī, *Sharḥ al-Sunna*, vol. 6, 168, uses the expression *al-'imām al-'adl* which means the proper or rightful ruler rather than the just ruler.

[644] Al-Shīrāzī, *al-Muhadhdhab*, vol. 2, 283. Al-Shīrāzī does not state that rebels must reach the rank of *ijtihād* in order for their *ta'wīl* to be considered plausible. Rather, he asserts that rebels are somewhat analogous to *mujtahids*. Later jurists explicitly state that rebels need not be *mujtahids*.

The Shāfi'ī jurists Imām al-Ḥaramyn al-Juwaynī (d. 478/1085) and Abū Ḥāmid al-Ghazālī (d. 505/1111) are helpful in identifying the assumptions that inform the analysis of the Shāfi'ī jurists of their time. Al-Ghazālī was a student of al-Juwaynī for a period of time, and both jurists were well-integrated within the legal institutions of their age. Both of them served as law professors in the Niẓāmiyya school in Nishapur, and their relationship with the Seljuks was largely non-problematic and congenial. Al-Juwaynī reportedly, at one point, left the city of Nishapur and headed to Baghdād because of the civil disorder that resulted from the schismatic conflicts between the Ash'arīs and their opponents, but he returned to Nishapur when stability was restored.[648] Al-Ghazālī, towards the end of his life, adopted Ṣūfī doctrines, and shied away from academic pursuits.[649] Both jurists dealt with the issue of the legality of rebellion, and the treatment of rebels. But their discussion on the topic of the treatment of rebels is not nearly as exhaustive as al-Māwardī's.

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[645] Ibid., vol. 2, 282.

[646] Ibid., vol. 2, 284. Al-Baghawī, *Sharḥ al-Sunna*, vol. 6, 170, asserts that the rebels must have a possible or plausible interpretation (*ta'wīl muḥtamal*), some strength or power and a chosen leader. If one of the three conditions are missing, they are to be treated as bandits, and their testimony or adjudications will not be accepted.

[647] Al-Shīrāzī, *al-Muhadhdhab*, vol. 2, 281.

Al-Juwaynī, in his theological work *Ghiyāth al-'Umam*, implies that the treatment of rebels is a separate matter than the larger issue of whether rebellions are legal. He asserts that *'aḥkām al-bughā*, which deals with the treatment of rebels, should be sought out in the technical books on law.[650] As to the issue of the legality of rebellion, he asserts that as a general matter, those in power must be obeyed. Individuals from among the laity may enjoin the good and forbid the evil as long as they do not use force and as long as their activity does not lead to the spread of violence and *fitan*.[651] More specifically, armed rebellions by individuals or small groups may not be tolerated or encouraged because this only leads to the spread of violence and lawlessness.[652] People should always weigh the harm that results from rebellions against the harm of obeying an unjust ruler, in most cases the harm of rebellion is greater because it leads to the shedding of blood and to the creation of various disasters. The presumption should be in favor of the *status quo* because a mere suspicion or anticipation that a greater good will result from rebellion is insufficient to justify the violence and harm that one, as a matter of certainty, knows will result.[653] One might argue, al-Juwaynī asserts, that a balancing of evils is improper when it comes to a matter of principle because 'Alī did not weigh the good against the evil when he decided to fight Mu'āwiya. 'Alī fought Mu'āwiya without regard to the results or possible harms. Al-Juwaynī refutes this argument by claiming many companions refused to support 'Alī specifically because they were concerned with the resulting harm. Furthermore, 'Alī, al-Juwaynī argues, did not foresee that resorting to war would lead to the amount of destruction that did, in fact, occur. Once 'Alī saw the results, he regretted fighting, and attempted to solve the problem peacefully through arbitration.[654] Therefore, if a person who enjoys a considerable amount of strength takes power, it becomes incumbent to recognize and obey him. This is exactly why al-Ḥusayn and al-Ḥassan, 'Alī's sons, gave their oath of allegiance to Mu'āwiya.[655] Al-Juwaynī explains that if a usurper is sinful or iniquitous, some have argued that he is to be recognized, but not as a rightful *'imām*. In other words, he is to be given *de facto* but not *de jure* recognition, and therefore, while he is to be recognized as the ruler, he is not to be given the oath of allegiance. Al-Juwaynī does not extensively comment on this position, asserting that while it is open to debate whether a usurper should be given the oath of allegiance, everyone agrees that a usurper must be recognized and obeyed.[656] In effect, al-Juwaynī argues that the prohibition against rebellion, and the recognition of a usurper are both a result of necessity. To argue otherwise is to grant a license to lawlessness. However, al-Juwaynī's position is not absolute. Firstly, to recognize a usurper constitutes by necessity a recognition of the fruits of rebellion. This is why al-Juwaynī also argues that if rebels rise against an established ruler and control a certain territory, their legal acts and adjudications must be recognized and not reversed, because to do otherwise is to harm people and to negate order.[657] Secondly, and more importantly, al-Juwaynī argues that if a pious man arises who wishes to enjoin the good and forbid the evil, and who wishes to uphold the best interests of Muslims while possessing enough power so that he is guaranteed a reasonable chance of success, then it is legal for him to rebel and "may God aid him to victory."[658] Consequently, al-Juwaynī's prohibition against rebellion is borne out of functional necessity and not principle. The right of a ruler to stay in power, and the right of a usurper to attain power is all relative. As a result of this logic, rebellion is prohibited not because it is inherently wrongful but because of its attendant consequences. Therefore, in his *Kitāb al-'Irshād*, al-Juwaynī argues that if a ruler becomes unjust and oppressive, the possessors of power in society (*ahl al-ḥal wa al-'aqd*, literally, "the people who loosen and bind") may cooperate in resisting and correcting him, even if it means that they would have to resort to the use of force and the waging of war against the ruler.[659] Fundamentally, because rebellion was not considered inherently evil or reprehensible, this, to a large extent, helps explain why Shāfi'ī jurists argued that rebels are not sinners, and advocated that rebels be treated with tolerance.

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[648] Ibn al-'Imād, *Shadharāt*, vol. 3, 359. On the schismatic conflicts in Nishapur, see Richard W. Bulliet, *The Patricians of Nishapur: A Study in Medieval Islamic Social History* (Cambridge: Harvard University Press, 1972).

[649] On al-Juwaynī, see Ibn Khallikān, *Wafayāt*, vol. 3, 167-168; al-Dhahabī, *Siyar*, vol. 18, 468-473; Ibn al-'Imād, *Shadharāt*, vol. 3, 358-360. On al-Ghazālī, see al-Dhahabī, *Siyar*, vol. 19, 322; Ibn al-'Imād, *Shadharāt*, vol. 4, 10-13.

[650] Abū al-Ma'ālī 'Abd al-Malik b. 'Abd Allāh 'Imām al-Ḥaramayn al-Juwaynī, *Ghiyāth al-'Umam fī al-Tiyāth al-Ẓulam*, ed. 'Abd al-'Aẓīm al-Dīb (Qaṭar: al-Maktabā al-Kubra: 1401 AH), 109.

[651] Al-Juwaynī, *Kitāb al-'Irshād 'ilā Qawāṭi' al-'Adilla fī 'Uṣūl al-'I'tiqād*, ed. 'As'ad Tamīm (Beirut: Mu'assasat al-Kutub al-Thaqāfiyya, 1992), 312. Additionally, al-Juwaynī notes that the laity may enjoin the good and forbid the evil only as to grave sins or issues not involving novel issues of law. Al-Ghazālī also argues that individuals may not resort to the use of force while attempting to enjoin the good and forbidding the evil because this invariably results in greater harm than good. He adds that if enjoining the good and forbidding the evil by speech alone will result in *fitna* and the spread of strife, then individuals must refrain from doing that as well. However, if the anticipated harm will befall the individual enjoining the good and forbidding the evil alone without resulting in a larger harm to society, then it is recommended that the individual resists injustice and sin through the use of speech. Al-Ghazālī emphasizes that the jurists have a duty to enjoin the good and forbid the evil even if the result is that they will be persecuted or harmed. He laments that the early jurists stood up to injustice and, as a result, were martyred while the jurists of his age are not nearly as upright. These early jurists relied on God and did not fear kings or rulers. Today's jurists, al-Ghazālī asserts, are silenced by greed, and no longer stand up to unjust kings or rulers. Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī, *'Iḥyā' 'Ulūm al-Dīn* (Beirut: Dār al-Ma'rifa, n.d.), vol. 2, 243, 357. Interestingly, the Shāfi'ī jurist al-Kiyā al-Harrāsī (d. 504/1110), *'Aḥkām al-Qur'ān*, vol. 3, 382, argues that fighting the *bughā* is itself a form of enjoining the good and forbidding the evil. He asserts that this is what 'Alī did when he fought those who rebelled against him. As noted below, this is a typically Ḥanafī position which was evidently borrowed by al-Kiyā al-Harrāsī.

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[652] Al-Juwaynī, *Ghayāth*, 115.

[653] Ibid., 109.

[654] Ibid., 111-115.

[655] Ibid., 326.

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[656] Ibid., 326-327.

[657] Ibid., 374.

[658] Ibid., 115.

[659] Al-Juwaynī, *Kitāb al-'Irshād*, 312.

Not all Shāfi'ī jurists, however, may be classified within a single trend. For instance, al-Ghazālī is relatively less tolerant of rebels. As will be recalled, al-Ghazālī, the author of the famous statement arguing for the necessity of obeying those in power, is cited by Gibb and others as the prime example of the quietism of Muslim jurists. However, although al-Ghazālī is less tolerant of rebels, his arguments are not absolutist nor simply opportunistic. In his apologetic work, *Faḍā'iḥ al-Bāṭiniyya*, al-Ghazālī argues that a ruler is needed to resolve conflict and establish order and stability. Therefore, the *'imāma* is established by power and the general willingness of the populace to obey a particular person in power. It is not necessary that everyone in society be willing to obey a ruler, because even God is not obeyed by all. Rather, it is enough that the ruler would possess the ability to establish order, and that a sufficient number of people would be willing to give him their allegiance. No specific number of people is required, but only that the number of those who do give the ruler their allegiance would be sufficient to maintain stability and order.[660] It is also not necessary that the ruler be a *mujtahid* himself, as long as he continues to seek knowledge, and as long as he consults with the jurists regarding every problematic issue that he might confront.[661]

Al-Ghazālī contends that if one looks objectively at the matter, one will clearly conclude that it is the 'Abbāsid Caliph al-Mustaẓhir Billāh (r. 487/1094 - 512/1118) who is the rightful ruler of al-Ghazālī's day and age. According to al-Ghazālī, after the caliph al-Muqtadī died, the *fitan* spread everywhere, and it was only al-Mustaẓhir who was able to restore peace and order.[662] But al-Ghazālī goes further and argues that at the beginning of the ʻAbbāsid caliphate there was general consensus on the right of the ʻAbbāsids to power. Therefore, anyone who rebels and seeks to displace an ʻAbbāsid caliph is to be considered a *bāghī*. Al-Ghazālī argues that one of the duties of the caliph is to "purify" the earth from all rebels, even if such rebels are in the Maghrib or in the far end of China.[663] Al-Ghazālī's work is primarily concerned with defending the ʻAbbāsids against the Bāṭinī (i.e., in this context, Fāṭimid) threat, and in fact, he states that if one rejects the Bāṭinī ruler, the only other possible option is to recognize the legitimacy of al-Mustaẓhir.[664]

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[660] Al-Ghazālī, *Faḍā'iḥ*, 144, 173-4, 177-8. Al-Ghazālī asserts that the ruler is God's shadow on the earth and that although the people are the ones who give effect to the ruler's power, the people are really the instruments of God. Hence, in reality, it is not the people who choose the ruler, but it is God that chooses the ruler using the people as God's instrumentalities.

[661] Ibid., 191, 193-194.

[662] Ibid., 182, 186-7. Al-Ghazālī also asserts that although the Turks, who were the holders of military power at the time, do not obey al-Mustaẓhir in all affairs, they do support him on most occasions. In fact, he is the only person who can muster their loyalty.

Despite al-Ghazālī's political motivations, he is not willing to support rulers without reservations. He argues that a ruler may be obeyed only to the extent that his orders are not contrary to God's commands. Al-Ghazālī cites the story, discussed earlier, concerning the commander who ordered his soldiers to throw themselves into the fire as proof of the fact that an illegal order should not be obeyed.[665] If the ruler's commands are illegal or if he does not rely on jurists, and someone more qualified for the position is found, people should weigh the benefits and costs of attempting to overthrow him, and replace him with someone better if they are able to do so.[666] Ultimately, despite all the polemics in favor of the ʻAbbāsid caliph, al-Ghazālī's argument, like al-Juwaynī's, reduces itself to a balancing act between the pros and cons of attempting to overthrow the ruler. Hence, the possibility of disobeying an illegal order or rebellion is not rejected off-hand.

Al-Ghazālī's treatment of the specific topic of rebellion takes place in his juristic work *al-Wajīz fī al-Fiqh*. It is in this work that one gains a fuller understanding of al-Ghazālī's attitude towards rebels, and as stated above, one finds that, compared to other Shāfiʻī jurists, his attitude is relatively less tolerant. Significantly, al-Ghazālī does not argue against the precedents of the Shāfiʻī school, but he gives the impression that the law on many points concerning rebels is unsettled and indefinite. He does not explicitly argue for positions that are less accommodating of rebels, but he implicitly leaves many points open to discretion and interpretation. Al-Ghazālī starts his analysis by employing a basic definition of the *bughā*: it is every group that rebels against the ruler while relying on an interpretation (*ta'wīl*), and enjoying a degree of power (*shawka*) which enables it to resist the ruler. Like other Shāfi'ī jurists, he does not attempt to clarify how much power is required by law in order for *shawka* to exist. However, he asserts that any *ta'wīl* which is of doubtful validity is to be considered effective for definitional purposes. In other words, if the interpretation of the rebels is groundless, and, as a matter of certainty, it is known to be erroneous, this is problematic. But if the interpretation is only suspected of being invalid, then it qualifies the rebels to be treated as *bughā*. Al-Ghazālī notes that there is disagreement as to whether Mu'āwiya's interpretation was certainly or probably invalid. The implication is that if Mu'āwiya's interpretation was certainly invalid, then even a groundless interpretation is effective in qualifying rebels for the status of *bughā*. Interestingly, however, al-Ghazālī asserts that although we (the Shāfi'īs) do not consider the Khawārij to be unbelievers, their interpretation is not to be recognized because it is clearly erroneous.[667]

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[663] Ibid., 178.

[664] Ibid., 170, 172.

[665] Ibid., 206-208.

[666] Ibid., 193.

Al-Ghazālī agrees that the rebels must be warned before being fought, but does not add that the rebels be given a chance to plead an injustice or debated.[668] He does note that both the rebels and loyalists are liable for any destruction that takes place before or after the fighting. As to the destruction incurred during the fighting, al-Ghazālī argues that there is no disagreement that the loyalists are not liable. However, as to the rebels, al-Ghazālī argues that there is disagreement as to whether they are to be held liable at all. If the rebels are considered liable, there is disagreement as to whether they are financially or criminally liable and as to whether they should perform atonement (*kaffāra*).[669] Al-Ghazālī goes on to state that there is no disagreement that if a few individuals have a *ta'wīl* but lack a *shawka* they are to be held liable. If a group, however, has *shawka* but lacks *ta'wīl*, there is disagreement as to whether they should be held liable.[670]

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[667] Abū Ḥāmid al-Ghazālī, *Kitāb al-Wajīz fī Fiqh Madhhab al-Imām al-Shāfi'ī* (Cairo: Maṭba'at al-'Ādāb, 1317 AH), 164.

[668] Ibid., 165.

Again, pursuing this method of indefiniteness, al-Ghazālī states that the fugitive should not be pursued if the rebels have been thoroughly defeated. Nonetheless, there is disagreement as to whether the same rule applies if it is feared that they will re-group in the immediate future. Al-Ghazālī claims that there is no disagreement that weapons of mass destruction should not be used if innocent people will be killed, but he claims there is disagreement if only the rebels are affected. The rebel prisoners and their weapons should not be released until the loyalists feel secure that the rebellion has ended. But he notes that if there is a general and indefinite expectation that if released, the prisoners might reignite the rebellion, there is disagreement on whether this is sufficient to continue detaining the rebels.[671] There is also disagreement, al-Ghazālī asserts, on whether the families of the rebels should be detained. Al-Ghazālī is somewhat more assertive when he discusses the legal acts of rebels. He argues that the testimony of rebels should be accepted in court if they relied on an interpretation in their rebellion, and that their legal acts and adjudications, if they prevail over a territory, should be recognized. Nonetheless, if the rebels enjoy a *shawka* but lack a *ta'wīl*, their adjudications should not be recognized or given effect.[672]

The fact that al-Ghazālī gives the impression that many areas in the field of rebellion are unsettled could be an indication that he does not find many of the inherited Shāfi'ī doctrines persuasive. Overall, his treatment of the topic is vague and non-committal.

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[669] Ibid., 164.

[670] Ibid., 165. The idea that even if a group does not have an interpretation it may still be exempted from liability became much more popular after al-Ghazālī's age.

[671] Ibid., 165.

[672] Ibid., 164.

Furthermore, his statements on some issues, such as the treatment of prisoners, adopt a tougher and less tolerant stance. Significantly, unlike other Shāfi'ī jurists, he does not use the word "loyalists" to refer to the opponents of the rebels. Rather, he often uses the first plural form "we," to refer to loyalists, and uses the third plural form "they" to refer to rebels. Therefore, he gives the impression that, as a jurist, he identifies himself with the loyalists rather than maintaining an objective distance from either party. But even if al-Ghazālī was not as supportive of *'aḥkām al-bughā* as other Shāfi'ī jurists, this area of the law had become sufficiently well-established that he could not refute or ignore it. Importantly, the fact that al-Ghazālī does not discount altogether the possibility that under certain circumstances a rebellion might be defensible, leads one to conclude that, in all probability, he would not have wanted to refute or ignore this area of the law even if he could have done so.

Other Shāfi'ī jurists contemporaneous to al-Ghazālī are not nearly as indefinite or non-committal. For example, 'Aḥmad al-Qaffāl (d. 507/1113), who taught in the Niẓāmiya school and was close to the caliph al-Mustaẓhir,[673] also noted some differences of opinions by Shāfi'ī jurists on the issue of rebellion. However, the scope of disagreements reported by him are far more limited than reported by al-Ghazālī, and he unequivocally endorses positions which are tolerant of rebels.[674] Shāfi'ī jurists such as Muḥammad al-Baghawī

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[673] Al-Qaffāl was the head of the Shāfi'īs in Iraq. He reportedly wrote his main work on jurisprudence, *Ḥulyat al-'Ulama'*, upon the request of the caliph al-Mustaẓhir. See Khayr al-Dīn al-Ziriklī, *al-'A'lām* (Beirut: Dār al-'Ilm li al-Malāyīn, 1989), vol. 5, 316.

[674] Al-Qaffāl insists, for instance, that a prisoner cannot be executed, and must be released once he gives an oath of allegiance or the fighting ends; whichever comes first. Sayf al-Dīn Abū Bakr Muḥammad b. 'Aḥmad al-Shāshī al-Qaffāl, *Ḥulyat al-'Ulamā' fī Ma'rifat Madhāhib al-Fuqahā'*, ed. Yāsīn 'Aḥmad Ibrāhīm (Mecca: Dār al-Bār, 1988), vol. 7, 617. Al-Qaffāl also notes that while some Shāfi'ī jurists argued that the rebels are responsible for the blood money of loyalists killed in battle, all Shāfi'īs agreed that the rebels cannot be physically punished. Ibid., vol. 7, 619. Al-Qaffāl is also more tolerant of the Khawārij than al-Ghazālī. He argues that they are to be treated like regular rebels. If a group adopts Khārijī views but do not rebel, they should not be fought. Interestingly, al-Qaffāl argues that if a rebel claims that he paid his land taxes (*kharāj*), he should not be believed. Ibid., vol. 7, 621. It is difficult to understand what he means by this assertion. It could mean that if the rebels prevail over a territory and collect land taxes, these taxes are to be recollected unless a person can *prove* that he, in fact, already paid such taxes. Alternatively, it could mean that the land taxes are to be recollected in all circumstances. But even then it is not clear whether the taxes are to be recollected from all the residents of the territory or recollected from those who had actively joined the rebellion. On the issue of recollection of taxes from conquered rebel

(d. 510/1116-7 or 516/1122)[675] lapse the *Sunna* and the law of rebellion together as if there is an exact correlation between the traditions of the *Sunna* and *'aḥkām al-bughā*. For example, he cites a tradition attributed to the Prophet commanding Muslims to kill the Khawārij wherever they may be found. However, he comments that this tradition means that the Khawārij may be fought only if they organize, collect weapons and assault people.[676] Otherwise, al-Baghawī's treatment of the subject is hardly indistinguishable from al-Māwardī's, and he does not allude to substantial differences of opinion on the subject.[677] In the final analysis, al-Ghazālī's discourse on the treatment of rebels is not representative of the views of the Shāfi'īs of his time. The inherited discourses of the law of rebellion had become a trademark of the school, and al-Ghazālī's ambiguities aside, the doctrines of *'aḥkām al-bughā* are reproduced and repeated as if they are an inherent part of the Islamic legal order.

Shāfi'ī jurists did not simply invent *'aḥkām al-bughā*; they constructed it from the inherited traditions of early Islam. The early rebellions of the companions, the 'Alids, and the 'Abbāsids were the motivating force behind this construction. Since the early centuries of Islam, power was obtained and retained by force. Rebellion and the use of force against those in power was not an anathema, and this fact was reflected in the early discourses of Muslim jurists. Without doubt, the interests of the jurists and the rulers often correlated and overlapped, but this did not mean that the jurists simply became the ideologues of the state. The emerging corporate or institutional culture of the jurists demanded that order and

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territory see Hossein Modarressi Tabātabā'i, *Kharāj in Islamic Law* (England: Anchor Press Ltd, 1983), 155-164. Modarressi reviews the various schools of thought on this matter concluding that the majority of jurists held that taxes should not be recollected from conquered territory when one is reasonably sure that the inhabitants of the territory have paid their taxes to the rebels.

[675] Al-Baghawī spent most of his life and died in Khurasān. He seems to have lived an apolitical life. See Ibn Khallikān, *Wafayāt*, vol. 2, 136-7; al-Dhahabī, *Siyar*, vol. 19, 439-443; Ibn al-'Imād, *Shadharāt*, vol. 4, 48.

[676] Al-Baghawī, *Sharḥ al-Sunna*, vol. 6, 165.

[677] He argues, for example, that the rebels are not financially or criminally liable for destruction incurred in the course of their rebellion; Ibid., vol. 6, 169.

stability be maintained, but once the precedents of the law of rebellion had come to existence, these precedents became an imperative force by themselves. Law often becomes its own justification. In other words, the law was preserved and upheld simply because it had become a part of the inherited culture of the jurists. By the 4th/10th century, the doctrines of the law of rebellion had become sufficiently established, and it had become increasingly difficult to ignore or to challenge their existence. This process was further aided by the fact that the jurists' main loyalty was to the institutions of law, and not necessarily to the state. Importantly, this process was not unique to the Shāfi'ī school, and even the Ḥanbalī school, despite its dogmatic rejection of the idea of armed rebellion, joined in the process of the acceptance and development of *'aḥkām al-bughā.*

The early adoption of *'aḥkām al-bughā* by Ḥanbalī jurists was imperfect and imprecise. For example, the Ḥanbalī jurist Abū al-Qāsim al-Khiraqī (d. 334/945-6) adopts a very general and imprecise definition of rebellion.[678] He argues that if Muslims accept a particular person as their ruler (*'imām*), if a group rebels against him, they should be fought. He does not mention the requirements of *ta'wīl* or *shawka*, but his assertions as to how this group should be treated does not differ from al-Shāfi'ī's in any material respect.[679] Reportedly, the Ḥanbalī jurist Abū Bakr b. Abī Dāwūd (d. 316/929) had argued that the specific number of the rebels is immaterial for the purposes of qualifying them as *bughā*. Abū Bakr's reported reasoning is interesting because he equates between the status of the rebels and the just ruler. Abū Bakr argues that the right of the just ruler (*al-'imām al-'ādil*) to rule does not depend on the number of his supporters.[680] Therefore, even if the just ruler loses many of his supporters, this does not necessarily mean that he has lost his right to stay in power. Similarly, the specific number of rebels is immaterial as long as the rebels distinguish themselves from the loyalists, and follow a chosen ruler.[681] The idea of using the same criteria to evaluate the legitimacy of the ruler and rebels is consistent with Aḥmad b. Hanbal's reported position that whoever wins should be recognized as the rightful ruler.[682] Importantly, Abū Bakr's position could be interpreted to mean that the requirement of *shawka* is not a qualifying condition for a group to be treated as *bughā*.[683] Even if this represented an early and ultimately unsuccessful Ḥanbalī trend, by the 5th/11th century, Ḥanbalī sources adopted nearly verbatim the Shāfi‘ī arguments and positions on the rebellion.[684] Ḥanbalī jurists did not produce the theoretical justification for the adoption of these positions until after the 6th/12th century.

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[678] On al-Khiraqī and his work, see Anas Khalid, "The *Mukhtasar* of al-Khiraqī: A Tenth Century Work on Islamic Jurisprudence," (Ph.D. diss., New York University, 1992), esp. 14-16.

[679] Abū al-Qāsim 'Umar b. al-Ḥusayn al-Khiraqī, *Mukhtaṣar al-Khiraqī 'alā Madhhab al-Imām 'Aḥmad b. Ḥanbal* (Damascus: Dār al-Salam, 1378 AH), 188.

[680] The import of this argument is to suggest that 'Uthmān remained the legitimate caliph despite of the popular upheaval against him. In all probability, Abū Bakr was at least partly motivated by a desire to defend 'Uthmān's legitimacy.

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[681] Reported in Abū Ya‘lā, *al-Masā’il*, vol. 2, 305.

[682] Abū Ya‘lā, *al-'Aḥkām*, 22-23.

[683] In fact, this is the sense in which Abū Ya‘lā understands Abū Bakr's position. See Abū Ya‘lā, *al-Masā’il*, vol. 2, 305. Abū Ya‘lā disagrees with Abū Bakr and argues that *shawka* or *min‘a* is a requirement in order for a group to qualify as *bughā*. He cites the example of Ibn Muljim who assassinated ‘Alī, and asserts that because Ibn Muljim acted without a *shawka*, he was held liable for his crime. However, Abū Ya‘lā also adds that Ibn Muljim's interpretation (*ta’wīl*) was inherently implausible. It is not clear whether Abū Ya‘lā is arguing that Ibn Muljim was held liable because his interpretation was implausible or because he acted without *shawka* or both.

[684] For example, see Abū Ya‘lā, *al-Masā’il*, vol. 2, 305-308; Idem, *al-'Aḥkām*, 54-56.

The Systematic Objectors and the Reluctant Borrowers: The Ḥanafīs and Mālikīs

It is difficult to speak of a comprehensive or cohesive Ḥanafī or Mālikī doctrine on the treatment of rebels in the 4th/10th and 5th/11th centuries. The reason for this is entirely different for each school. In the case of the Ḥanafī school, there is a basic position inherited from the discourses of al-Shaybānī, Abū Yūsuf, and perhaps, Abū Ḥanīfa. However, the justifications and elaborations upon this basic position are quite varied. It is likely that the Ḥanafī position in the 4th/10th and 5th/11th centuries is the product of an adherence to precedent, and an adoption or borrowing of some ideas from the Shāfi'ī school. The Mālikīs, on the other hand, continued to be reluctant in adopting the laws of rebellion, and overall, did not distinguish between a rebel and a bandit. In fact, a comprehensive Mālikī doctrine on rebellion did not develop until the 6th/12th century.

In principle, Ḥanafī jurists distinguished between bandits and rebels, and in fact, a large part of the Ḥanafī discourse focused on the theoretical difference between these two categories. Nonetheless, as we saw above, Shāfi'ī and Ḥanbalī jurists argued that it is illegal to seek the assistance of Ḥanafīs in fighting rebels because Ḥanafīs believe that it is proper to dispatch the fugitive and wounded. From this fact alone, one is reluctant to generalize about the relationship between the Ḥanafī school and the political structure of the state.[685] Ḥanafī jurists do not simply leave the treatment of rebels to the unmitigated discretion of the state. Furthermore, certain trends within the Ḥanafī school adopt positions that can only be unhelpful to the state. Nonetheless, compared to the Shāfi'īs, the Ḥanafī school is generally less tolerant of rebels. This could be due to the fact that both

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[685] However, Aziz Al-Azmeh, *Muslim Kingship*, 188, states, "In all, the Ḥanafī legal tradition seems far more apprised of the idea of a strong state than the more demotically pietistic Shāfi'ī which appears far more bookish. It was perfectly suited to the Ottoman state." He goes on to say, "But none of this detracts from the essential equivalence of the notions of authority held by the different schools, although the absolute exercise of authority according to the Shāfi'ī traditions is more minutely regulated by knowledge whose custodians are the *'ulamā'*." The assertion made in the last sentence is not supported by evidence.

Abū Yūsuf and al-Shaybānī were judges, and more accepting of 'Abbāsid legitimacy. Once the precedent was set by the early Ḥanafī jurists, it became self-perpetuating, and difficult to override. Certainly, as discussed below, some of the later Ḥanafī jurists modified aspects of early Ḥanafī doctrine on rebels, and became central to the revisionist trend. Nevertheless, while the Ḥanafī jurists of the 4th/10th and 5th/11th centuries made the theoretical distinction between bandits and rebels sharper and clearer, they also corroborated the idea that rebellion is a sin.

Not all Ḥanafī jurists argued that rebellion is a sin. Abū Bakr al-Jaṣṣāṣ (d. 370/980-1), for example, asserts that both bandits and rebels are considered Muslims. He argues, at length, that the *ḥirāba* verse was revealed to address highway robbers, and not apostates or rebels. A material element of the offenses of rebellion and banditry is the existence of a degree of power (*min'a*). This is why, al-Jaṣṣāṣ maintains, banditry is a crime which can only be committed away from a town or city.[686] Like rebels, bandits organize and gather in a specific territory, and refuse to abide by the commands of the ruler. The moment the bandits organize and gather in a location with the intent of terrorizing the wayfarer, the elements of the crime of *ḥirāba* are complete. Therefore, it is not necessary that the bandits rob or kill anyone in order for the crime of *ḥirāba* to exist. In contrast, a person who attacks and robs people in a town or city is to be treated as a common thief, and not a bandit.[687] Importantly, the main distinction between bandits and rebels is that rebels rely on an interpretation (*ta'wīl*), and therefore, rebels are fought only for the limited purposes of repelling their harm and self-defense, while bandits are fought in order to punish them for their crimes.[688]

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[686] The received Ḥanafī position is that banditry is committed only in the desert away from urban centers.

[687] Al-Jaṣṣāṣ, *'Aḥkām al-Qur'ān*, vol. 2, 413-414. The author argues for *tartīb* and not *takhyīr* in punishing the bandit. He argues that the ruler has limited discretion in punishing bandits. If the bandits commit the crime of *ḥirāba* and nothing else, they are to be imprisoned. If they kill, the bandits must be killed; if they usurp money, they must be amputated from opposite ends. If, however, they kill and usurp money, the ruler has four options. The ruler may amputate and crucify the bandits; he may amputate them with nothing further; he may crucify them; or he may execute them. Ibid., vol. 2, 409-411.

Like other jurists, al-Jaṣṣāṣ focuses on defending the notion that people should support the ruler in fighting rebels. He concedes that Mu'āwiya was a *bāghī* against 'Alī, but he rejects the argument that the precedents of the Prophet and the companions prohibit supporting the ruler in fighting the rebels. Fighting rebels is a form of enjoining the good and forbidding the evil, and therefore, is commendable.[689] The Prophet's traditions prohibiting Muslims from joining *fitna*, al-Jaṣṣāṣ contends, do not apply to fighting rebels because the Prophet intended to prohibit wars of tribalism or of blind partisan causes (*'aṣabiyya*). Significantly, however, al-Jaṣṣāṣ argued that fighting in support of the ruler is, by definition, rightful and proper. He asserts that the group that supports the ruler (*al-'imām*) is of necessity the rightful or just group (*al-fi'a al-'ādila*), and does not seem concerned with the justness or substantive quality of the ruler's reign. Simply because a ruler is in power, he is to be supported.[690] As noted earlier, similar to Shāfi'ī and Ḥanbalī jurists, al-Jaṣṣāṣ was arguing for the need for law and order which is represented by the necessity of supporting the ruler who has established himself in power.

Al-Jaṣṣāṣ goes on to argue that the rebels are not fought for adopting a particular system of belief. In fact, if a group adheres to or adopts rebellious ideas, such as the ideas of the Khawārij, that alone does not grant a license to the loyalists to fight them. The rebels are fought only in self-defense, and hence, if the rebels no longer insist on fighting the loyalists, they are not to be fought.[691] It is not clear how much the rebels need to do

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[688] Ibid., vol. 2, 410, vol. 3, 402.

[689] Ibid., vol. 3, 399-400. The author notes that some have argued that the only weapons that may be used in fighting rebels are sticks and other non-lethal instruments. The author calls this argument absurd. Obviously, as noted earlier, whether rebels should be fought was a politically charged issue from early on, and al-Shāfi'ī, among others, insisted that, in principle, a ruler or a just ruler should be authorized to fight rebels. The issue was initially raised in the context of arguing about whether 'Alī acted appropriately when he decided to fight the rebels, and whether people should have supported him against his foes. However, this early largely dogmatic problem became relevant to the issue of whether a ruler should be assisted against rebels. The dogmatics of 'Alī's conflict quickly became a legal front or camouflage for the practical problem of whether people should support rulers against rebels.

[690] Ibid., vol. 3, 400-401. In response to the argument that even 'Alī, although the rightful ruler, was not supported by all the companions, al-Jaṣṣāṣ makes the implausible argument that those companions did not join 'Alī because they saw that he had enough supporters and did not need their assistance.

[691] Ibid., vol. 3, 401, 404.

before it becomes permissible to fight them, but al-Jaṣṣāṣ argues that before the rebels are fought they must be warned and given an opportunity to desist.[692] This, of course, implies that the loyalists do not have to wait until they are attacked first. At any case, due to the fact that they rely on an interpretation, the rebels are not held liable for life or property destroyed in the course of the fighting.[693]

All of the discussed above is not unique to the Ḥanafī school; similar arguments have been made by Shāfi'ī or Ḥanbalī jurists. Al-Jaṣṣāṣ, however, discusses several points which become integral to the Ḥanafī discourse. Al-Jaṣṣāṣ notes that while all jurists agreed that the property and monies of rebels may not be confiscated, some Ḥanafī jurists held that whatever is found in the rebel war camp is to be considered loot. Other jurists maintained that the rebels' weapons and horses may be used against them, but after the fighting ends, the rebels' money and horses must be returned to them. Al-Jaṣṣāṣ asserts that the truth of the matter is that reports on 'Alī's conduct are inconsistent on this matter. But al-Jaṣṣāṣ seems to favor the view that none of the rebels' property or money may be confiscated, although the weapons may be temporarily used against the rebels.[694] Furthermore, he asserts that all the earlier authorities from his school (i.e. the authorities that preceded the formation of the Ḥanafī school) held that the fugitive may not be pursued and the captive or wounded may not be dispatched. However, al-Jaṣṣāṣ concedes that late Ḥanafī jurists disagreed with this position, and argued that as long as the rebels have reinforcements or an undefeated party (*fi'a*), the fugitive, prisoner and wounded may be killed. Al-Jaṣṣāṣ does not explicitly disagree with what he describes as the late Ḥanafī position, although he does imply that he does not find the arguments of the late school persuasive.[695]

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[692] Ibid., vol. 3, 401.

[693] Ibid., vol. 3, 402. Al-Jaṣṣāṣ cites an earlier opinion attributed to Abū Yūsuf which maintained that the rebels are not to be held liable if they repent and abandon their rebellion. This opinion, which hinges a pardon from liability on repentance, does not seem to have survived in the Ḥanafī school.

[694] Ibid., vol. 3, 402.

As we saw earlier, several jurists held that the testimony and legal acts of rebels should be recognized, however, the Ḥanafī position by the 4th/10th and 5th/11th centuries had become opposed to this view. Neither the legal acts nor the testimony of rebels should be accepted because rebellion is a sin, according to the Ḥanafī's, and therefore, rebels are iniquitous (*fasaqa*). The credibility of sinners is suspect, and hence, their testimony and legal acts cannot be recognized. Al-Jaṣṣāṣ, himself, accepts the view that as a general matter, the judgments and legal acts of the rebels should not be recognized. He qualifies this position in three important respects. One, if the rebels appoint a judge who is loyal to them, his judgments should not be given effect unless they are consistent with the views of a loyalist judge. Two, if the rebels appoint a loyalist judge, his decisions should be given full faith and credit. Three, al-Jaṣṣāṣ argues that recognizing the judgments of rebels does not imply that loyalists and rebels are of equal status. Rather, it means that one should not look at who appointed a certain judge, but instead, at the character of the specific judge in question. What is important is that the judge, himself, be considered of just character, regardless of who appoints him. While al-Jaṣṣāṣ mentions the view that the rebels lack credibility because they are sinners, he does not explicitly endorse this view.[696]

Aside from legal judgments and testimonies, al-Jaṣṣāṣ deals with the question of taxes collected by the rebels. He argues that people who gave their alms (*zakāh*) to rebels should be advised to re-pay their alms again because giving it to rebels is not religiously effective. However, he notes that because this matter is between people and God, people should not be forced to repeat their alms. As to other taxes (*ṣadaqāt*), al-Jaṣṣāṣ asserts that the loyalists should not re-collect them either. Al-Jaṣṣāṣ's reasoning is most interesting. He argues that people pay taxes in return for the right of protection from the ruler. Since the ruler failed to protect the inhabitants of a certain territory from the rebels, the right of the ruler to collect such taxes drops, and hence, the taxes should not be recollected.[697]

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[695] Ibid., vol. 3, 402.

[696] Ibid., vol. 3, 403.

Some of al-Jaṣṣāṣ's views are not representative of what eventually becomes the predominant Ḥanafī position. For example, al-Jaṣṣāṣ does not deal with whether funeral prayers should be performed on dead rebels. One suspects that he avoids the issue because he is reluctant to hold that rebels are iniquitous. But it is important to note that al-Jaṣṣāṣ was not a minor figure in the Ḥanafī school of thought. In fact, he was considered the leader of the Ḥanafī school in Baghdād, and although he cooperated with the government of his time, he turned down an offer to become the chief judge of Baghdād.[698] Nonetheless, his views should not be seen as a product of his own personal legacy as much as they are an indication of the unsettled status of Ḥanafī doctrines at his time. It is clear from al-Jaṣṣāṣ's treatment that there were several competing tendencies within the Ḥanafī school. Al-Jaṣṣāṣ supports the general position that law and order should be upheld, but he is not a hard-liner on the issue of the treatment of rebels. His positions are based on certain trends within the Ḥanafī school in the 4th/10th century. The Ḥanafī position on rebellion never becomes entirely uniform, and the trends that al-Jaṣṣāṣ represent do not completely disappear. However, the predominant Ḥanafī position becomes less tolerant over the issue of how rebels are to be treated.

The liberal or tolerant trend was still evident more than a century later in the writing of the Ḥanafī judge Abū Qāsim al-Simnānī (d. 499/1105). Al-Simnānī rejects the idea that the ruler should be recognized or not recognized on an ideological basis. He asserts that the Zaydīs and others have argued that a pious man who fulfills the qualifications of the *'imāma* may rise against the unjust rulers and enjoin the good and forbid the evil, and declare himself to be the true ruler of Muslims. This leads to chaos and disorder, and therefore, it cannot be permissible.[699] Al-Simnānī notes that a ruler in power enjoys a presumption of obedience which entitles him to resist and fight rebels.[700] Interestingly, however, al-Simnānī argues that if the ruler becomes oppressive and unjust, and usurps property, then it becomes incumbent upon the jurists and Muslims to overthrow him.[701] The author goes on to argue that rebels should not be considered unbelievers or hypocrites, and he supports a policy of tolerant treatment towards rebels.[702] In the middle of his discourse on rebellion the author reportedly writes the following passage:

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[697] Ibid.

[698] Al-Dhahabī, *Siyar*, vol. 16, 340-1; Ibn al-'Imād, *Shadharāt*, vol. 3, 71. Al-Jaṣṣāṣ was also accused of harboring Mu'tazilī tendencies.

> "In the final analysis, this whole affair today is hopeless, and if the scholars and those who wrote the books of jurisprudence saw what we see today, they would have known that [all of this] applied to a different age. Today we see the rebels in every town, and every person does what he wishes without anyone uniting the Muslims, and honoring the affairs of this religion."[703]

This passage appears to be a sharp departure from the flow of al-Simnānī's narrative,[704] and in light of the author's general position, it is difficult to make sense of its intended purpose. It is possible that al-Simnānī is lamenting the fact that no one fights over religious causes any more. In other words, al-Simnānī, like other jurists, seems to consider tribal or partisan wars to be inherently unjustified and evil. The rebels that he has in mind are those who fight over a religious interpretation or those who fight to enjoin the good and forbid the evil. This reliance on a plausible *ta'wīl* is what entitles the rebels to a tolerant treatment. Therefore, al-Simnānī could be condemning the fact that, in his age, everyone fights over earthly interests that have nothing to do with what he considers to be just causes.[705] Alternatively, al-Simnānī could be lamenting the fact that rulers do not treat rebels as believers and do not observe the rules of conduct that the jurists have explicated on this matter.[706] It is quite likely that al-Simnānī considers the whole discourse of *'aḥkām al-bughā* to be irrelevant to his age, and that the historical developments since the discourse was formed had created a considerable gap between the political and social realities and the legal discourse. Al-Simnānī is lamenting the abscence of a government that is capable of establishing law and order. The law of rebellion had assumed the existence of a government which unites Muslims, and which, in turn, is capable of applying the law of rebellion. But in his day everyone seems to be a rebel, and there is considerable confusion as to who is legitimate and who is not. Therefore, al-Simnānī is expressing doubt over the relevance or applicability of this whole discourse to his time. Importantly, after al-Simnānī makes this remark he continues to elucidate the remainder of the laws of rebellion without further comment or qualification. If this passage was, in fact, authored by al-Simnānī, it is a powerful demonstration of the impact of precedent on the legal mind. Whatever the particular objections al-Simnānī might have had concerning this field of the law, and it is not clear what the objections in fact were, the author continued to engage the precedents, picking one precedent over the other, but he was unable to restructure or significantly alter the whole discourse.

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[699] Al-Simnānī, *Rawḍat al-Quḍāh*, vol. 1, 71.

[700] Ibid., vol. 2, 1215. The expression used by the author is *al-'imām al-muftaraḍ al-ṭā'a* which means the ruler to whom obedience is due. However the expression is somewhat ambiguous. It could mean "the ruler who is presumably entitled to obedience" or it could mean "the ruler who enjoys a presumption of obedience." Effectively, it could mean that the ruler is entitled to fight the rebels unless it becomes clear that he is not entitled to obedience, or it could mean that a ruler who is in power is presumed to be entitled to obedience, and hence, is empowered to fight the rebels. Furthermore, it is not clear when does a ruler lose the right to be obeyed.

[701] Ibid., vol. 1, 152. Al-Simnānī claims that this has been the consistent practice of Muslims in dealing with corrupt rulers.

[702] For example, while mentioning the Ḥanafī view that as long as the rebels remain a viable threat or have reinforcements, their captive, wounded and fugitive may be killed, the author asserts that once a rebel lays down his weapon and asks for a guarantee of safety he should be granted it. The author argues that none of the rebels' property may be confiscated, and their weapons may be used only if absolutely necessary. Unlike other Ḥanafī jurists, he also maintains that the heads of rebels may not be severed and sent across the land. Ibid., vol. 2, 1215-1218.

[703] Ibid., vol. 2, 1219.

[704] One cannot exclude the possibility that it was added to the original text by a copyist as a form of critique against the juridical discourse on rebellion.

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[705] As we will see, several of the later jurists comment that everyone in their day and age fights over the *dunyā* (earthly interests) and not *dīn* (religious causes).

[706] This possibility is supported by the fact that this passage occurs immediately after al-Simnānī mentions that 'Alī was asked about the Khawārij, and he denied that the Khawārij are either unbelievers or hypocrites.

Many of al-Simnānī's arguments were representative of the evolving Ḥanafī doctrines on rebellion.[707] However, the most exhaustive and representative exposition in the 5th/11th century is that of the Ḥanafī jurist Abū Bakr al-Sarakhsī (d. 483/1090-1).[708] Like his predecessors, al-Sarakhsī maintains that the main distinction between bandits and rebels is that rebels adopt a *ta'wīl*.[709] Again, in the same fashion of earlier Ḥanafī jurists, he does not elaborate upon the notion of a *ta'wīl* or explain what would count as a legally recognizable *ta'wīl*. Importantly, however, al-Sarakhsī assumes that the *ta'wīl* is going to be a religious interpretation concerning God's law.[710] He also implies that, as a legal matter, the *ta'wīl* must be presumed erroneous, and therefore, the substantive content of the rebels' ideology or interpretation is irrelevant.[711] As a general matter, al-Sarakhsī argues, Muslims should not become involved in or partake in *fitna*. Nevertheless, when a ruler comes to power and is able to establish order and stability, those who rise against him are the ones who are causing *fitna*. In doing so, they are committing a sin, and fighting these rebels is a form of enjoining the good and forbidding the evil because it is a way to bring an end to the *fitna* that the rebels have caused.[712] Al-Sarakhsī does not attempt to argue that the prohibition against engaging in *fitna* only applies to tribal or partisan warfare. Rather, he makes the straight-forward claim that rebellion is a disruption of stability and order, and therefore, it is *fitna*. Fighting rebels brings an end to disorder and precludes the *fitna*, and hence, Muslims should support the ruler against rebels.[713] Importantly, however, al-Sarakhsī adds that because the rebels rely on an interpretation, they and the loyalists are considered as equals in terms of the applicability and the treatment of the law (*wa al-taswiya bayn al-fi'atayni al-mutaqātilatayni bi ta'wili al-dīni fī al-aḥkām 'aṣl*).[714]

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[707] For example, his assertion that funeral prayers should not be held over dead rebels. Ibid., vol. 2, 1217. Al-Samnānī distances himself from this position somewhat by stating that his colleagues ruled as such, but he does not explicitly endorse this position.

[708] It is often stated that al-Sarakhsī was the most important Ḥanafī jurist of the 5th/11th century, but little is known about his life. He was imprisoned for ten years under the Qarakhānids (382/992 - 609/1212) reportedly because of some of his legal positions. However, it appears that at some points in his life he did enjoy the patronage of certain rulers. See al-Ziriklī, *al-'A'lām*, vol. 5, 315; Ibn al-'Imād, *Shadharāt*, vol. 3, 367; Heffening, "Sarakhsī," in *Encyclopedia of Islam*, 1st ed., vol. 7, p. 159.

[709] Interestingly, al-Sarakhsī discusses Abū Ḥanīfa's view that banditry can only be committed outside a town or city. He notes that some late Ḥanafī jurists have argued that Abū Ḥanīfa's opinion was very much a product of his age and specific context. These late jurists claimed that in Abū Ḥanīfa's time people used to carry weapons inside a town and, therefore, people were able to protect themselves from bandits inside of a town. However, these jurists argued that people no longer carried weapons while in a town or city, and hence, were now vulnerable to banditry committed in urban centers. Consequently, these jurists advocated that banditry be recognized as a crime that could occur inside or outside of a city. Al-Sarakhsī mentions this discussion but does not resolve the issue. Al-Sarakhsī, *al-Mabsūṭ*, vol. 9, 201. On the distinction between bandits and rebels, see Al-Samarqandī (d. 539/1144-5), *Tuḥfat al-Fuqahā'*, vol. 3, 157, who adds that even if the rebels commit highway robbery, they are not to be treated as bandits because they rely on a *ta'wīl*.

[710] He refers to "*bi ta'wīli al-dīni fī al-'aḥkām*." Al-Sarakhsī, *al-Mabsūṭ*, vol. 10, 128. Al-Samarqandī, *Tuḥfat al-Fuqahā'*, vol. 3, 157, defines rebellion in the following way: Rebels disobey certain laws while enjoying a degree of power and force, and while relying on an interpretation as the Khawārij and others have done.

[711] Al-Sarakhsī, *al-Mabsūṭ*, vol. 10, 128.

Al-Sarakhsī goes on to argue that the point at which it becomes legal to seize or fight rebels is when such rebels organize and gather, and exhibit a firm intent to rebel. He rejects the idea that the ruler must wait until his troops are attacked before it becomes legal for him to respond. However, he also rejects the idea that mere talk of rebellion is sufficient to authorize hostile actions against rebels. The rebels must commit overt acts which clearly indicate an intent to rebel, such as organizing and gathering in a specific location. At that point, the ruler should imprison or fight the rebels before their *fitna* spreads, and becomes uncontrollable. Al-Sarakhsī cites the precedents in which 'Alī declares that he will not fight the Khawārij until they fight him first. But he argues that this should be read to mean that 'Alī refused to fight the rebels until they formed a clear and immediate intent to use force against him.[715] Likewise, al-Sarakhsī concedes that 'Alī commanded that the fugitive, captive or wounded should not be dispatched. He also mentions that 'Alī used to take an oath from captives that they would not return to rebellion, and then release them. However, he argues this only applies if the rebels have been thoroughly defeated and do not have any other reinforcements. He argues that as long as reinforcements remain, it is within the ruler's discretion to imprison, execute or pardon the fugitive, captive or wounded. Importantly, unlike al-Simnānī, al-Sarakhsī does not qualify this view in any way. He gives the distinct impression that this is a settled point of law, and does not cite any other views on the matter.[716] Furthermore, al-Sarakhsī does not show a particular concern with the issue of how long captured rebels may be held. He simply states that rebels may be held until none of their party remains, and then they should be released.[717]

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[712] Ibid, 124. Al-Sarakhsī is responding to the argument that supporting a ruler against rebels is a form of perpetuating *fitna*. He concedes that Abū Ḥanīfa had advised Muslims not to get involved in *fitna*, however, he argues that this does not apply to lending support to a firmly established ruler.

[713] Ibid. The author argues that the companions who failed to support 'Alī did so because they were incapable of fighting. Therefore, the precedent of the companions who refused to support 'Alī cannot be cited as evidence that Muslims should not support the ruler against the rebels.

[714] Ibid., vol. 10, 128.

Overall, al-Sarakhsī, and other Ḥanafī jurists, advocate a harsher policy towards rebels. For instance, al-Sarakhsī asserts that it is recommended that the ruler warn the rebels before attacking them, but this is not mandatory and is to be left to the ruler's discretion. Furthermore, the ruler may use weapons of mass destruction including fire and flooding against the rebels.[718] He also argues that, as a general matter, it is reprehensible to sever any head, including the heads of rebels, and send them across the land. He claims that 'Alī and Abū Bakr refused to do so, and when told that the Persians and Byzantiums follow this practice, Abū Bakr commented, "We are neither Persians nor Byzantines. The Book (Qur'ān) and traditions are sufficient for us (i.e. we follow the Book and traditions)." Nonetheless, al-Sarakhsī notes that some of the late Ḥanafīs permitted the practice because the Prophet did not object to it.[719] By citing the Prophet's supposed precedent in this context, al-Sarakhsī effectively legitimates the already widespread practice of severing the heads of rebels as proof of their defeat.[720]

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[715] Ibid., vol. 10, 125-126. See also al-Samarqandī, *Tuḥfat al-Fuqahā'*, vol. 3, 313, who advocates a less exacting standard. He argues that if a group relies on an interpretation and isolates itself from the *jamā'a* the ruler may imprison them until they repent. If they resist, he may fight them.

[716] Al-Sarakhsī, *al-Mabsūt*, vol. 10, 126, 128. Hostages taken from rebels, al-Sarakhsī argues, may not be killed under any circumstances. Also see al-Samarqandī, *Tuḥfat al-Fuqahā'*, vol. 3, 313. Also see al-Sarakhsī, *Sharḥ Kitāb al-Siyar*, vol. 4, 1439, vol. 5, 2263.

[717] Al-Sarakhsī, *al-Mabsūt*, vol. 10, 127. Al-Samarqandī, *Tuḥfat al-Fuqahā'*, vol. 3, 313, asserts that if the rebellion is thoroughly defeated, rebels may be held until they repent, and then they should be released.

[718] Al-Sarakhsī, *al-Mabsūt*, vol. 10, 128, does not qualify this by asserting, for example, that such weapons may be used only if absolutely necessary or only if innocent non-combatants will not be hurt.

Al-Sarakhsī adds that the loyalists may not seek the assistance of unbelievers against Muslim rebels, but they may seek the assistance of scriptuaries (*ahl al-dhimma*).[721] Interestingly, however, he argues that if the scriptuaries assist the rebels, this does not constitute an abrogation of their covenant with the loyalists. Even if the scriptuaries assist the rebels, both the scriptuaries and the rebels remain a part of the abode of Islam. Therefore, as far as liabilities are concerned, the scriptuaries are to be treated on an equal footing with Muslim rebels.[722] Importantly, although the rebels are considered Muslim, dead rebels may not be prepared for burial by performing the ritual washing, and funeral prayers should not be performed on them either. They, however, are to be buried simply for sanitary reasons (*li 'imāṭati al-'adhā*), and because it was the practice of 'Alī to bury his dead opponents. Loyalists killed in battle, on the other hand, are martyrs and are to be treated as such.[723] Of course, as we saw earlier, al-Sarakhsī's position on this matter is neither novel nor unprecedented. Nonetheless, al-Sarakhsī's tone and style is quite assertive, and it conveys the impression that this is the only possible position on the matter.

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[719] Ibid., vol. 10, 131. Al-Sarakhsī does not give any details as to when or how the Prophet supposedly accepted this practice. He does not explain if this was done in the Prophet's presence, and the Prophet did not object to it. Otherwise, the Prophet's silence is not an endorsement of something that might have never come to his attention. Al-Samarqandī, *Tuḥfat al-Fuqahā'*, vol. 3, 314, notes that such a practice is reprehensible, but it is permissible if it would demoralize and weaken the rebels.

[720] Al-Sarakhsī does not discuss the equally widespread practice of crucifying (hanging) rebels.

[721] Al-Sarakhsī, *al-Mabsūṭ*, vol. 10, 133-4.

[722] Ibid., vol. 10, 128. It should be recalled that earlier jurists argued that the scriptuaries are to be held liable for property and life destroyed in the course of rebellion. Furthermore, they argued that assisting the rebels does not constitute a violation of the scriptuaries' covenant only if the scriptuaries claimed ignorance of the illegality of their acts.

[723] Ibid., vol. 10, 131. Also see al-Samarqandī, *Tuḥfat al-Fuqahā'*, vol. 3, 314.

Al-Sarakhsī contends that, at a religious level, the abode of the rebels and the abode of the loyalists are one and the same. Therefore, the property of rebels remains sacrosanct and may not be confiscated. The rebels' weapons may be used against them, but must be returned after the rebellion ends. Horses and livestock should be sold, and the price held in trust until the rebellion ends and then returned as well.[724] As to matters of liability, al-Sarakhsī contends that since the rebels' interpretation is considered, as a matter of law, to be erroneous, the existence of an interpretation alone is not sufficient to exempt the rebels from liability. However, once the rebellion commences, the existence of an interpretation coupled with the existence of power (*min'a*) means that the ruler's sovereignty (*wilāyāt al-'ilzām*) over the rebels has been interrupted. It should be recalled that according to al-Sarakhsī, the rebellion commences once the rebels gather, organize and evidence a clear intent to rebel. Therefore, according to al-Sarakhsī, it is from that point on that the rebels are not to be held liable for offenses committed or for life or property destroyed. If, on the other hand, one or two men rebel while relying on an interpretation, they are to be treated as common thieves because they remain under the ruler's sovereignty.[725] Interestingly, unlike other jurists, al-Sarakhsī does not maintain that rebels without *shawka* are to be treated as bandits; rather, they are to be treated as common thieves.[726]

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[724] Al-Sarakhsī, *al-Mabsūt*, vol. 10, 126-7. Al-Samarqandī, *Tuḥfat al-Fuqahā'*, vol. 3, 313, adds that the loyalists do not have to compensate the rebels for any weapons or property used or lost.

[725] Al-Sarakhsī, *al-Mabsūt*, vol. 10, 128, 134. Al-Sarakhsī also argues that if the rebels offer to surrender on the condition that they not be held liable for offenses or destruction caused before the commencement of the rebellion, the ruler may not agree to this condition. Everything destroyed before and after the rebellion involves the private rights of people, and the ruler does not have the right to forgive offenses committed against private rights, Ibid., vol. 10, 131. Al-Samarqandī, *Tuḥfat al-Fuqahā'*, vol. 3, 314, asserts that the rebels are liable for everything committed before or after the rebellion because, except for the duration of the rebellion, the rebels remain a part of the abode of Islam. The loyalists are liable for all life or property destroyed before or after the rebellion as well. See al-Simnānī, *Rawḍat al-Quḍāh*, vol. 2, 1221, who argues that if individuals or small groups who have an interpretation are exempted from liability, this is bound to lead to the spread of lawlessness because, comforted by the fact that it will not be held liable, every minor or insignificant group will invent an interpretation and rebel.

Al-Sarakhsī adopts the Ḥanafī territorial theory of jurisdiction. Therefore, like his predecessors, al-Sarakhsī argues that the loyalists do not have jurisdiction over crimes committed in rebel territory.[727] However, he argues that since the rebels are considered iniquitous (*fasaqa*), the testimony of their witnesses cannot be accepted by loyalist judges. Presumptively, al-Sarakhsī argues, all residents in rebel territory are considered rebels. Therefore, if a judge from a rebel territory writes to a loyalist judge asserting a claim of right, and such claim is attested by witnesses, the loyalist judge should not recognize such claim. If, however, the loyalist judge has personal knowledge that the witnesses are not affiliated with the rebels, the judge may accept the claim of right under these circumstances. Similarly, if the rebels appoint a judge who is known to be a loyalist, his judgments should be recognized. Al-Sarakhsī adds that it is entirely appropriate for a loyalist to accept a judicial appointment in rebel territory as long as he applies the law of Sharī‘a properly and without bias.[728] In this situation, the loyalty of the appointee is to the Sharī‘a, and not to a particular party. Under any circumstance, if the loyalists eventually conquer the rebel territory, the adjudications of all their judges, loyalists or otherwise, in the interest of finality of judgments, are to be recognized and given full effect, as long as such judgments are well-supported in law or deal with novel or unsettled points of law. This is so, even if in the personal opinions of the loyalist judges such judgments are erroneous.[729] In a rather remarkable passage, al-Sarakhsī supports his argument by citing an example in which he claims that the ’Umayyads were the *bughā*. Despite the fact that the 'Umayyads were rebels, several notable jurists accepted judicial appointments in their administration.

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[726] Al-Sarakhsī uses the expression *luṣūṣ* and not *quṭṭā‘* or *muḥāribūn*. This is significant because the treatment of bandits in Islamic law is far more stringent than the treatment of common thieves. Of course, one cannot exclude the possibility that al-Sarakhsī used the word for thieves rather than bandits out of sloppiness. However, this is unlikely because, as will be shown, other Ḥanafī jurists concurred in his judgment.

[727] Al-Sarakhsī, *al-Mabsūṭ*, vol. 10, 130.

[728] Ibid., vol. 10, 130-1. Also see al-Samarqandī, *Tuḥfat al-Fuqahā’*, vol. 3, 314.

[729] Al-Sarakhsī, *al-Mabsūṭ*, vol. 10, 135.

Furthermore, al-Sarakhsī argues that the caliph ʻUmar b. ʻAbd al-ʻAzīz (r. 99/717 - 101/720), after coming to power, recognized the adjudications and judgments of the judges appointed by the 'Umayyads.[730] Nonetheless, ʻUmar b. ʻAbd al-ʻAzīz, himself, was an 'Umayyad caliph, and therefore, this indicates that al-Sarakhsī, at least in this context, is distinguishing between rebels and loyalists purely on ideological grounds. In other words, al-Sarakhsī apparently considers the 'Umayyads to have been illegitimate rulers and therefore, he brands them as rebels. However, he also seems to have considered, as is popular in many Muslim discourses, the caliph ʻUmar b. ʻAbd al-ʻAzīz to have been a just ruler. Consequently, despite the fact that this caliph is technically a part of the 'Umayyad dynasty, he is not branded as a rebel.[731] This is significant because, as discussed earlier, al-Sarakhsī argues that if a ruler becomes well-established and is able to secure law and order, he is considered the legitimate ruler and all who rebel against him are to be treated as the *bughā*. Of course, at the time al-Sarakhsī was writing it was entirely safe to treat the 'Umayyads as illegitimate, and to speak of ʻUmar b. ʻAbd al-ʻAzīz in favorable terms. Nonetheless, I think this passage points to something more significant than a politically correct recasting of history. Unlike al-Simnānī, al-Sarakhsī does not explicitly state that under certain circumstances it becomes permissible to rebel and overthrow an unjust ruler. In fact, al-Sarakhsī exhibits a clear preference for maintaining the *status quo*, and order and stability. Nevertheless, as discussed later, like other jurists from the various schools, he was willing to leave open the possibility for a rebel of the moral and religious caliber of ʻUmar b. ʻAbd al-ʻAzīz to be declared the true *'imām*, and his opponent the wrongful *bāghī*.

By the 5th/11th century, the Ḥanafī school had clearly adopted the discourse on rebellion. As we have seen, the doctrines of the schools remained somewhat unsettled.

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[730] Ibid., vol. 10, 130-1.

[731] ʻUmar b. ʻAbd al-ʻAzīz is held in high esteem by Sunnī and non-Sunnī jurists, and many Muslims have claimed that he is a fifth rightly guided caliph. Although he was an Umayyad geneologically, at a moral level he is not treated as an 'Umayyad.

Nonetheless, overall, the doctrines of the school were less accommodating or tolerant of rebels than the Shāfi'ī, and perhaps, the Ḥanbalī schools. The idea that rebellion is a sin (*ma'ṣiya*), and that rebels are iniquitous had found firm support in the discourses of the Ḥanafī school. Furthermore, the Ḥanafīs were willing to give the ruler greater latitude and discretion in dealing with rebels. The idea that rebels may be pursued and the prisoners executed became well-established. This motivated the Shāfi'īs to go as far as to argue that it is illegal to seek the assistance of Ḥanafīs in fighting rebels. Nonetheless, even the Ḥanafīs refused to equate rebels who are motivated by a cause or interpretation, with bandits who are motivated by prurient interests. An ideological offender is not the same as a common criminal. However, the definition of a rebel, other than the twin conditions of *ta'wīl* and *shawka*, remained vague. Consequently, although Ḥanafī jurists, compared to their Shāfi'ī counterparts, clearly catered to the pragmatic interests of the state, they still retained the power of distinction and definition. They retained the power to define and differentiate a rebel from a non-rebel, and to distinguish legitimate rulers from sinful rebels.

Shāfi'ī, Ḥanbalī and Ḥanafī jurists in the 4th/10th and 5th/11th centuries, for the most part, do not identify specific contemporaneous parties as rebels or non-rebels. They do specifically mention 'Alī, the Khawārij and, at times, the 'Umayyads, because of the imperative of precedent on legal thinking. These were the early precedents upon which the discourse on rebellion was constructed, and as we have seen, the jurists creatively selected and read such precedents in order to delineate general legal principles and specific rules of conduct. Some active jurists such as al-Māwardī and al-Ghazālī identified certain 'Abbāsid caliphs as the legitimate rulers, and implied that those who defy their authority become the *bughā*. Nevertheless, the majority of jurists do not indicate, for example, whether the Fāṭimids, Ibn Ṭūlūn of Egypt, or the Seljuks are rebels. Nonetheless, this is hardly surprising. The jurists were interested in constructing normative principles and rules; the application of these principles or rules to specific fact situations would be decided on a case by case basis. These case by case considerations would be channeled back to a reformulation and rearticulation of the principles and rules. The complex interplay of precedent, contemporaneous reality and normative values would ultimately result in reformulations of the legal doctrine. However, as argued earlier, this often resulted in delayed responses to social and political realities. The fact that the discourses on rebellion had become firmly established by the 5th/11th century in the Shāfi'ī and Ḥanafī schools is due largely to the fact that jurists from these schools were building upon the precedents set by al-Shāfi'ī, Abū Yūsuf, and al-Shaybānī. The Ḥanbalī school, lacking a precedent of its own, seems to have borrowed most of its doctrines from the Shāfi'ī school. As discussed earlier, the Mālikī school did have its own traditions and precedents on the issue, but such precedents were ambiguous and conflicting. Nonetheless, it is exactly in this type of situation that a powerful social or political reality might delay or hamper the adoption or borrowing of an already established body of law. Looked at differently, if the traditions or precedents of a school are ambiguous and uncertain, powerful social or political circumstances may perpetuate this ambiguity or uncertainty. As argued below, Mālikī jurists in North Africa, confronting constant rebellions by the Khawārij, Qarāmiṭa and Berbers, did not develop a consistent doctrine on rebellion; they did, however, develop systematic discourses on bandits. Meanwhile, Malikī jurists who lived or studied in the eastern part of the Islamic civilization in the 5th/11th century did commence the process under which *'aḥkām al-bughā* was borrowed and adopted into Mālikī discourses.

The majority of Mālikī jurists in the 4th/10th and 5th/11th centuries do not mention *'aḥkām al-bughā* and do not address rebellion as a specific legal category. While they do not explicitly state that rebels are to be treated as bandits, they do not conceptually distinguish between bandits and rebels either. It should be recalled that Mālikī discourses in the 3rd/9th century were ambiguous about the status of the Khawārij and other rebellious groups. Saḥnūn reported that early Mālikī jurists maintained that there is a conceptual distinction between the Khawārij and bandits; the Khawārij fought out of a misguided sense of piety and were motivated by a religious interpretation. Bandits, on the other hand, are common thieves or worse who are motivated by prurient interest. Nonetheless, it was argued that the Khawārij and other sectarian groups should repent or be put to death. It was not clear how rebels who might not be sectarian or who adopt ideas not considered heretical, should be treated. This basic ambiguity survives into the 4th/10th century, but even further, some Mālikī jurists refer only to banditry and omit any reference to the Khawārij.[732] Other Mālikī jurists such as Abū al-Qāsim Ibn al-Jallāb (d. 378/988) give the impression that the law of banditry may, under certain circumstances, be applied to rebels. He, for example, notes that Mālik ruled that the Qadariyya, Ibāḍiyya and similar groups (*ahl al-'ahwā'*) should repent or be killed, and then without interruption, he states that those who commit banditry inside or outside a city should be subject to the laws of banditry.[733] The structure of the narrative leaves one with the impression that no distinction is drawn between the above mentioned groups and bandits. Importantly, Ibn al-Jallāb, in this context, does not specify which crimes constitute banditry, and he does not refer to highway robbery as a specific category.[734] He only states that if a group of people commit banditry, the ruler has the option of either killing, crucifying, severing a hand and foot from opposite ends; or beating, banishing and imprisoning them.[735] Ultimately, one does not know which specific groups, if any, Ibn al-Jallāb has in mind when he addresses the laws of banditry. Perhaps it is relevant that the author's time was plagued with rebellions by the Qarāmiṭa who, as noted earlier, followed methods of indiscriminate slaughter, pillaging and plundering reminiscent of the acts of bandits or brigands.[736] The author, however, does not mention the Qarāmiṭa but does mention the much older precedent of the Qadariyya. Presumably, however, the Qarāmiṭa could be included in the broad category of *'ahl al-'ahwā'*.

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[732] Muḥammad b. Ḥārith al-Khishanī (d. 361/971), *'Uṣūl al-Futyā fī al-Fiqh 'alā Madhhab al-'Imām Mālik*, ed. Muḥammad al-Majdūb, Muḥammad Abū al-Ajfān and 'Uthmān Baṭikh (n.p.: Dār al-'Arabiyya li al-Kitāb, 1985), 352, states only that the ruler may choose whichever penalty to apply in dealing with a bandit except that if a bandit commits murder, the ruler must execute him. Interestingly, the editor to the work states that a bandit is a *bāghī* who threatens the security of the community. Abū Muḥammad 'Abd Allāh b. Abī Zayd al-Qayrawānī (d. 386/996), *al-Risāla*, (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, n.d.), 330-1; only states that if a bandit kills, he must be killed. Otherwise, the ruler has discretion on the fate of a bandit according to his history of criminality and the degree of danger posed to society by the bandit. Abū Muṭraf 'Abd al-Raḥman b. Qāsim al-Sha'bī al-Mālaqī (d. 497/1103), *al-'Aḥkām*, ed. al-Ṣādiq al-Ḥalawī (Beirut: Dār al-Gharb al-Islāmī, 1992), 189, 349, only addresses banditry and causing corruption on the earth.

[733] Abū al-Qāsim 'Ubayd Allāh b. al-Ḥusayn b. al-Ḥasan b. al-Jallāb al-Baṣrī, *al-Tafrī'*, ed. Ḥusayn b. Sālim al-Dahmānī (Beirut: Dār al-Gharb al-Islāmī, 1987), vol. 2, 232-3.

[734] In a different context, however, he does state that if a group of Muslims commit highway robbery and cause corruption on the earth, all Muslims should assist the ruler in fighting them and in ridding Muslims of their evil, Ibid., vol. 2, 362.

[735] Ibid., vol. 2, 233. The author adds that a bandit may be executed even if he does not commit murder. The ruler may choose to banish him to a town in which he is imprisoned until he repents. If a bandit

Mālikī jurists of the 5th/11th century, particularly those who studied under Shāfi'ī and Ḥanafī jurists, to a limited extent, reintegrated the discourse on rebellion. Nonetheless, despite the fact that the discourses on rebellion had become well-established in the other Sunnī schools of thought, the status of these discourses continued to be ambiguous in the Mālikī school. The Andalusian judge Abū Walīd al-Bājī (d. 494/1100-1), for instance, studied with several Shāfi'ī and Ḥanafī jurists including Abū Isḥāq al-Shirāzī and al-Simnānī in Baghdād, Mosul, Damascus and Ḥalab.[737] He adheres to Mālikī precedent in the sense that most of his discussion is dedicated to the matter of banditry. His discussion of banditry is long and detailed, and cites various opinions on a broad range of issues.[738] He argues that a bandit is one who uses weapons to terrorize the wayfarer and obstruct free passage inside or outside of a town. He also argues that those who obstruct free passage are bandits even if they do not seek financial gain or the usurpation of property.[739] He concludes that whoever carries a weapon and terrorizes people without enmity or rancor is

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repents and surrenders before being captured, then the specified punishments for the crime of banditry should not be applied. Nonetheless, the bandit will still be liable for life or property destroyed. This means that the victims of the bandit's crimes have the option of demanding retaliation or compensation, or they may forgive the bandit.

[736] See the notes by the editor in Ibid., vol. 2, 378.

[737] Ibn al-'Imād, *Shadharāt*, vol. 3, 344-5; al-Dhahabī, *Siyar*, vol. 18, 535-40.

[738] Al-Bājī, *al-Muntaqā*, vol. 7, 169-175.

[739] Ibid., vol. 7, 169, the author adds that, for example, those who declare that they will not allow a group of people to travel to Egypt, Shām or Mecca are bandits regardless of their motivation for doing so.

a bandit because such a person obstructs free passage and causes corruption on the earth.[740] This is a very broad definition which dictates that any person or group of persons who terrorizes others and renders them helpless to resist are to be treated as bandits. Al-Bājī argues that the ruler should have discretion (*takhyīr*) in punishing bandits, however, the ruler should not exercise that discretion according to whim or caprice. Rather, the ruler should consult the jurists about the appropriate punishment due to each case of banditry. Al-Bājī adds that if a bandit does not kill or usurp property, but has a long record of banditry, it is preferred that the ruler beat, banish and imprison him. However, if the ruler wishes to execute or sever his hand and foot from opposite ends, the ruler may do so.[741] Of course, if the crime of banditry could exist despite the fact that the bandit had not killed or usurped money, this has clear political connotations. A political or religious rebel might terrorize the wayfarer and refuse to kill or usurp property, yet apparently be treated as a bandit. Nevertheless, in a rather ambiguous passage al-Bājī notes that a bandit is distinguishable by the fact that he disobeys the ruler out of pride or power, and not out of a religious conviction or belief.[742] The author does not elaborate or explain what the attendant consequences are if such a person does, in fact, rely on a religious conviction or system of belief. Therefore, although al-Bājī acknowledges that there is a conceptual distinction between those who are motivated by a religious conviction and those who are not, he does not explore the implications of this position.

Perhaps the most fascinating Mālikī treatment of the subject of rebellion in the 5th/11th century is that of Andalusian judge Ibn 'Abd al-Barr (d. 463/1071). Ibn 'Abd al-Barr started out as a follower of the Ẓāhirī school, and although he later switched to the Mālikī school, he was heavily influenced by Shāfi'ī jurisprudence.[743] Ibn 'Abd al-Barr achieves a synthesis in Mālikī doctrine that clearly reflects Shāfi'ī and Ẓāhirī influences. He is not willing to abandon Mālikī precedents or arguments, however he also integrates elements of the Shāfi'ī and Ẓāhirī analysis which enable the Mālikī position to be more systematic and coherent. Ibn 'Abd al-Barr, like other Mālikī jurists, focuses much of his attention on the issue of banditry.[744] He argues that anyone who terrorizes and obstructs the wayfarer and spreads corruption on the earth is a bandit.[745] However, unlike many other Mālikī jurists, Ibn 'Abd al-Barr explicitly discusses the category of rebellion. He argues that if a group rebels against a ruler without a just cause, then a just ruler may fight them.[746] He then repeats the common Shāfi'ī doctrines of rebellion: the fugitive, captive and wounded may not be dispatched and rebel property may not be confiscated, and if they rely on an interpretation, the *bughā* or the Khawārij are not to be held liable for life or property damaged in the course of their rebellion.[747] Importantly, however, he argues that even if the rebels rely on an interpretation, if they terrorize the wayfarer, obstruct passage, and usurp property, they are to be treated as bandits and not as *bughā*.[748] Therefore, despite their interpretation or religious convictions, if the rebels pursue improper means, they are to be treated as bandits. This is exactly the position implied by the discourses of other Mālikī jurists. Ibn 'Abd al-Barr makes the argument explicit. Rebels are to be treated with a degree of tolerance unless they pursue methods similar to those pursued by the

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[740] Ibid., vol. 7, 169. If the crime motivated rancor or enmity between certain individuals then any offense committed is treated as a common crime.

[741] Ibid., vol. 7, 171-172.

[742] Ibid., vol. 7, 170.

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[743] Ibn al-'Imād, *Shadharāt*, vol. 3, 314; al-Dhahabī, *Siyar*, vol. 18, 153-160; Ibn Khallikān, *Wafayāt*, vol. 7, 66.

[744] Abū 'Umar Yūsuf b. 'Abd Allāh b. Muḥammad b. 'Abd Al-Barr al-Nimrī, *al-Tamhīd li mā fī al-Muwaṭṭa' min al-Ma'ānī wa al-Asānīd*, ed. Muṣṭafā b. 'Aḥmad al-'Alawī and Muḥammad 'Abd al-Kabīr al-Bakrī (n.p.: Dār al-Ḥadīth al-Ḥasaniyya, 1967), 222-3, 582-6.

[745] Ibid., 582-3. The author adds that if a criminal poisons or sedates his victims, he is to be treated as a bandit.

[746] Ibn 'Abd al-Barr does not elaborate upon the possibility that the rebels would have a just cause or that the ruler would be unjust. The implication of his argument is that if either of these situations exist, the ruler does not have a right to fight the rebels. As we will see below, the Ẓāhirī jurist Ibn Ḥazm, who was Ibn 'Abd al-Barr's friend and close associate, argues that whomever has the just cause is not to be treated as the rebel. Conversely, if the ruler is unjust, the ruler is considered to be the rebel.

[747] Ibid., 222.

[748] Ibid., 583-4.

Qarāmiṭa and similar groups. If the method pursued resembles acts of banditry, then it is treated as a crime of banditry.

The Counter-Tradition of the Dissenters: The Shī'ī and Ẓāhirī Alternative

By the 5th/11th century, both the Ẓāhirī and Shī'ī schools of thought had become fully involved in the juridical debates on rebellion. What distinguishes the discourses of these schools is that they are thoroughly ideological, and that they tend towards the moralistic. While the other schools tended to focus on the treatment due to rebels, and for the most part, were not concerned with the justness of the rebels' cause, the Ẓāhirī and Shī'ī schools focused on the moral or theological worth of the rebels' cause. Put differently, the Ẓāhirī and Shī'ī schools focused on the legitimacy or justness of the ruler contrasted to or in relation to the legitimacy or justness of the cause espoused by the rebels. Therefore, much of their discourse focused on a qualitative assessment of the substantive base of the rebels' claims. The above-mentioned appraisal must be qualified, however, in one important respect. As noted earlier, most of the schools discussed above did not entirely abandon the possibility of recognizing the legitimacy of the rebels' cause. Rather, they tended to focus on the technical rules relating to the treatment due to rebels. The Ẓāhirī and Shī'ī schools, at least by the 5th/11th century, did not separate the theological and moral question of the rightfulness of the ruler from the largely legal issue of how to treat rebels. This is particularly so in the case of Ibn Ḥazm the Ẓāhirī. As we will see, the Shī'ī position, however, eventually became practically indistinguishable from Sunnī discourses on the subject.

The Ẓāhirī School

The Ẓāhirī school founded by Dāwūd b. 'Alī (d. 270/884) has become extinct, and most of its texts did not survive.[749] Nevertheless, the Ẓāhirī doctrine on the issue of rebellion is represented in the writings of the Andalusian Ibn Ḥazm (d. 456/1064). But it is not clear to what extent Ibn Ḥazm's arguments reflect Ẓāhirī doctrines as opposed to his own idiosyncratic positions. Ibn Ḥazm attributes many of his arguments to the Ẓāhirī school in general, but in all probability these arguments represent Ibn Ḥazm's own views on rebellion and have little to do with the Ẓāhirī school.[750] Ibn Ḥazm's arguments are somewhat conflicting and inconsistent but it is quite clear that he is intolerant of what he considers to be unjust rebels or rulers. Ibn Ḥazm has an unwavering allegiance to his own definition of orthodoxy, and he does not distinguish between the need for law and order and the imperatives of correct belief. However, Ibn Ḥazm was not a stranger to the institutions of the state or the pragmatic processes of government. Like his father, he served as a minister and state administrator under the 'Āmirids of Valencia. However, early on in his life he abandoned all political positions and dedicated himself to scholarship. He is reported to have been a rather unpleasant and contentious character. He consequently won the animosity of most politicians and jurists, and died in exile.[751] His writings reveal a remarkable willingness to declare the ruler an outlaw and, under certain circumstances, even criminalize a ruler's behavior.

Ibn Ḥazm asserts the general principle: Muslims should obey a rightful ruler, and rebellion against such a ruler is a sin. As a general matter, the unity of Muslims is imperative, and divisiveness is a sin as well.[752] Ibn Ḥazm, however, qualifies this general principle in several important respects. Whether the rebels are liable for their actions in the Hereafter or on this earth depends on the nature of the system of belief or convictions that inspired the rebellion in the first place. Furthermore, depending on the circumstances, the ruler could be declared an outlaw or even a bandit to be treated as a *muḥārib*. Ibn Ḥazm asserts that not all rebels are equal; rather, rebels differ according to the *ta'wīl* they espouse and the reason for their rebellion.[753] If the rebels rely on a plausible religious interpretation, they are to be considered similar to *mujtahids* who exercise an independent judgment regarding a specific point of law. This is so even if the interpretation is against an established consensus, as long as the rebels do not realize that a consensus exists, or clear proof of the existence of such a consensus has not reached them.[754] Furthermore, if the rebels espouse a plausible cause relating to a grievance concerning a specific issue, this *ta'wīl* is legally recognizable as well. Ibn Ḥazm demonstrates this point by arguing that Mu'āwiya, for example, refused to give 'Alī his pledge of allegiance because 'Alī had failed to capture and punish 'Uthmān's assassinators. Ibn Ḥazm argues that although Mu'āwiya's reasoning was ultimately wrong, this type of interpretation or cause is legally recognizable.[755] Therefore, if rebels espouse these types of interpretations they will not be held liable in the Hereafter. In fact, because these rebels are well-intentioned, even if they are ultimately misguided, they will be rewarded by God in the Afterlife.[756] As to issues of liability on this earth, the state treasury should pay the blood money for any person killed by the rebels in the course of the rebellion, but the rebels are to be held liable for any property destroyed. In other words, the state is responsible for personal injuries, and the rebels are responsible for injuries to property.[757] Ibn Ḥazm does not explain why the state treasury should pay the blood money of individuals killed, and does not explain why the rebels should be personally responsible for destroyed property. Interestingly, however, Ibn Ḥazm argues that the tradition attributed to al-Zuhrī which states that the companions agreed that all life and property destroyed pursuant to an interpretation should be forgiven is fabricated.[758] Although Ibn Ḥazm challenges the authenticity of this tradition and others, he does not provide an alternative rationalization for his position.[759] He does, however, seem to rely on a non-specific assumption that those who rebel because of non-prurient interests should not be treated as common criminals.

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[749] See, Melchert, *The Formation*, 178-190.

[750] This is especially so in light of the fact that Ibn Ḥazm seems to have developed his own group of loyal followers known as the Ḥazmiyya, see al-Ziriklī, *al-A'lām*, vol. 4, 254.

[751] Al-Dhahabī, *Siyar*, vol. 18, 184-198; Ibn al-'Imād, *Shadharāt*, vol. 3, 299; Ibn Khallikān, *Wafayāt*, vol. 3, 325.

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[752] Ibn Ḥazm, *al-Muḥallā*, vol. 11, 354.

[753] Ibid., vol. 11, 333, 346, Ibn Ḥazm inconsistently states that rebels are of two distinct types, but later he claims that rebels are of three distinct types. This could be a copyist error because, substantively, his argument is consistent.

[754] Of course, it is quite possible that the rebel's would not consider consensus to be binding. Ibn Ḥazm does not deal with this eventuality.

[755] Ibid., vol. 11, 335.

[756] Ibid., vol. 11, 333.

Ibn Ḥazm holds a very different view of those who rebel because of what he considers to be an implausible interpretation. He does not provide systematic guidelines for what is to be considered an implausible or unreasonable interpretation. Rather, Ibn Ḥazm asserts that any group which obfuscates or ignores the *Sunna*, or blatantly refuses to recognize the rights of people or God, is to be treated as if it had no *ta'wīl* at all. Ibn Ḥazm's list of examples of unreasonable interpretations include: denying that the *'imāma* should be in Quraysh, denying that an adulterer should be stoned, treating Muslims who commit a sin as infidels, killing Muslim children and women, denying predestination, denying the possibility of intercession, declaring that some of the companions have become apostates, arguing that God does not know the future until it occurs or refusing to pay the

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[757] Ibid., vol. 11, 346. Ibn Ḥazm does not mention the requirement of *shawka*. However, he seems to assume that the rebellion will be instigated by a group. He does not explicitly address the possibility of an individual rebel.

[758] Ibid., vol. 11, 345.

[759] Ibid., vol. 11, 340-1, Ibn Ḥazm argues that the tradition attributed to Prophet regarding the *bughā* is fabricated. He also argues that the traditions which assert that 'Alī treated the properties found in the rebels' war camp as spoils of war are unauthentic as well.

zakāh.[760] He argues that groups who adopt such interpretations will not be excused in the Hereafter, and should be held liable for all life and property destroyed during the course of their rebellion.[761] Ibn Ḥazm does not explain whether such a group should be treated as *bughā* or not, but the import of his argument is that such a group is to be treated as common criminals or perhaps apostates.[762]

Ibn Ḥazm distinguishes the two types discussed above from those who rebel for worldly reasons, such as a desire to usurp power or for tribal loyalties. Like other jurists, Ibn Ḥazm's historical examples are derived from the 'Umayyad period, but they have profound implications well beyond their immediate context. Ibn Ḥazm argues that historical figures such as Yazīd b. Mu'āwiya, Marwān b. al-Ḥakam and Abd al-Malik b. Marwān all rebelled against Ibn al-Zubayr, and Marwān b. Muḥammad rebelled against Yazīd b. al-Walīd for worldly reasons, and because they coveted power. Essentially, these rebellions were political disputes that had little to do with religion.[763] Nevertheless, even when it comes to what Ibn Ḥazm considers to be purely political disputes, Ibn Ḥazm evaluates rebels according to an entirely pietistic and subjective standard. Those who he perceives as pious leaders are considered the rightful rulers, and those who fought them are seen as the rebels. Pursuant to this logic, it is Yazīd who is the rebel and not Ibn al-Zubayr, regardless of the fact that it was Ibn al-Zubayr who challenged 'Umayyad rule and was ultimately defeated. In any case, Ibn Ḥazm argues that this category of rebels are, in fact, *bughā*, but they are to be held liable for life and property destroyed all the same. Importantly, if the ruler that such a group rebelled against is also a political opportunist and is equal in moral worth to the rebels he is fighting, both groups, the ruler and the rebels, are to be held liable for life and property destroyed. In other words, if both the ruler and the rebels are fighting over power and worldly interests, both sides are of equal worth and both sides are morally and legally liable.[764] Ibn Ḥazm adds that in the case of rebels motivated by a simple desire to usurp power, if such a group commits acts of banditry such as terrorizing the wayfarer or indiscriminately slaughtering people or usurping money, they are no longer to be treated as *bughā* but must be treated as bandits.[765]

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[760] Ibid., vol. 11, 334-335, 343.

[761] Ibid. vol. 11, 347.

[762] Ibid., vol. 11, 343. Ibn Ḥazm is unclear on this point. He seems to be arguing that if such a group commits acts of banditry and violates the established consensus, then they are to be treated as apostates. Earlier, however, he argues that the Khawārij and similar groups (*ahl al-'ahwā'*) are *bughā*, but they are to be held liable anyway. See Ibid., vol. 11, 333.

[763] Ibid., vol. 11, 335.

In all of the above, Ibn Ḥazm assumes that the ruler is either superior, or at least equal, in moral value to the rebels. He, however, goes further and argues that if the rebels revolt seeking to enjoin the good and forbid the evil and establish the Qur'ān and *Sunna*, then they are not rebels at all. Rather, whoever opposes them, even if it is the ruler, is the rebel and they are to be considered the just and rightful party. Furthermore, whoever resists an injustice or defends his life or property against an aggressor, even if the aggressor is the ruler, is not a rebel. Instead, it is the aggressor who is the outlaw and the rebel. Citing the precedent of the companions, Ibn Ḥazm argues that Muslims may rightly resist paying unjust taxes even if this means that they may have to resort to force. In this situation, the ruler is the rebel and those who resist are the rightful and just party. Ibn Ḥazm notes that some have argued that an established ruler cannot be considered a rebel, regardless of the reason that motivated a particular group to rebel. He, however, argues that God did not distinguish between a ruler and rebels in moral responsibility. Therefore, an unjust ruler or a ruler who resists enjoining the good or forbidding the evil is to be treated as the equal of any other Muslim. Therefore, a ruler may be considered the *bāghī* just like any other element in society.[766] Similarly, any person who causes corruption on the earth and terrorizes people is to be treated as a bandit. If the caliph, himself, commits these acts, then the caliph should be considered a bandit and should be treated as such. Ibn Ḥazm also adds that if the caliph orders his soldiers to terrorize people, usurp their property, and commit rape, then the caliph and his soldiers are bandits.[767]

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[764] Ibid., vol. 11, 333, 343, 347. However, Ibn Ḥazm indicates that in this situation, those who are killed fighting rebels are martyrs. See Ibid., vol. 11, 348. He does not explain why, if both sides are considered of equal moral worth, those who are killed while fighting on the side of the ruler are considered martyrs.

[765] Ibid, vol. 11, 333, 343.

Ibn Ḥazm's approach is highly subjective. He assumes that in the majority of situations, a just cause can be distinguished from an unjust cause. In order to make this determination, a subjective inquiry into the specific content or substance of the cause espoused by a group is necessary. If the cause is determined to be rightful or just, then those who are leading an insurrection are not to be considered rebels at all, and the ruler and his government may be declared outlaws. Consequently, by definition, one cannot be declared a rebel unless one's cause is unjust or erroneous. But even then, there is a fine line between an erroneous cause and an un-Islamic cause. Those whose interpretation violates the *Sunna* or those who fight out of a desire to usurp political power are to be held liable for life and property destroyed during the course of the fighting. Under certain circumstances, those whose interpretation is not within the scope of a proper *'ijtihād* or who rebel for tribal or purely political reasons may be considered bandits. Those whose interpretation is within the proper scope of an *'ijtihād* cannot be considered bandits. But Ibn Ḥazm's definition of banditry is very wide and ambiguous. He insists that a *bāghī* and a *muḥārib* are two distinct and different categories.[768] He adds that a bandit is anyone who causes corruption on the earth and terrorizes the wayfarer by killing, stealing or raping. He contends that this is so, whether the crime is committed in a city or the desert, in daylight or at night, or in a mosque or the caliph's palace.[769] At this point, it sounds as if Ibn Ḥazm is arguing that any crime which renders its victim helpless to resist and has the

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[766] Ibid., vol. 11, 335-6.

[767] Ibid., vol. 12, 283.

[768] Ibid., vol. 12, 281.

[769] Ibid., vol. 12, 283.

effect of terrorizing people is banditry. However, he goes on to say that whoever raises a sword intending to terrorize people is a bandit.[770] Nonetheless, he even goes further and argues that those who refuse to pay the *zakāh* may be considered bandits. If a group, while acknowledging that the *zakāh* is a religious obligation, defiantly refuses to pay it, and uses force to resist payment, the group is to be treated as bandits.[771] Ultimately, Ibn Ḥazm does not explain who will make the institutional determination as to whether: 1. A group is espousing a just cause and therefore, its members are not rebels at all; 2. A group is espousing a plausible but erroneous *'ijtihād*, and so its members are to be treated as rebels but not considered bandits; 3. A group is coveting political power or espousing an implausible and erroneous cause, and so its members are to be treated as rebels and, possibly, bandits; and 4. What particular institution has the power to declare that the ruler is now to be treated as a rebel or possibly a bandit.[772]

Clearly, Ibn Ḥazm is not interested in institutions or in the pragmatic application of the law. His discourse is a form of uncompromising moralizing, and although throughout his argument he refers to the far more technical treatments of the other schools, he criticizes these schools for their failure to make the proper moral judgments, and for slavish adherence to precedent.[773] But it is also clear that Ibn Ḥazm is not encumbered by earlier opinions or precedents from his own Ẓāhirī school of thought. He seems unrestrained in his attempt to re-invent and reconstruct the discourses on rebellion so that the whole field would become a powerful form of moralizing about the orthodoxy of various rebellious sects and the legitimacy of problematic rulers.

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[770] Ibid., vol. 12, 292. Ibn Ḥazm adds that if a person raises a sword because of an enmity or a cause, he is not a bandit.

[771] Ibid., vol. 12, 290. Ibn Ḥazm argues that if the group refuses to acknowledge that the *zakāh* is a religious obligation, then the group is to be treated as apostates.

[772] It is worth noting that Ibn Ḥazm advocates particularly harsh sanctions for bandits. For example, he is one of the very few jurists who asserts that a bandit should not be killed then crucified or crucified then killed. He argues that a bandit should be crucified and left to die a slow and agonizing death. Ibid., vol. 12, 296-7.

[773] For example, see Ibid., vol. 11, 336, 357. Ibn Ḥazm was also motivated by sectarian convictions. It was important for Ibn Ḥazm to establish that the rebels against 'Uthmān were unbelievers. However he considered the rebels against 'Alī to be errant Muslims, who should be forgiven.

Ibn Ḥazm becomes somewhat technical when he addresses the treatment due to those who qualify as *bughā*. He argues that as a general matter, rebels should not be slaughtered and should be fought for the limited purpose of removing their harm. The rebel's life is not protected only as long as he continues to fight.[774] He argues that a captive rebel may not be executed under any circumstance.[775] Rebel property, including weapons and horses, remain protected and may not be confiscated or used unless it becomes absolutely necessary to use some of the rebels' weaponry for the limited purpose of self-defense.[776] The wounded and fugitive may be killed, however, if the rebellion continues or if the rebels have reinforcements.[777] If women and children may be hurt, the rightful party may not use fire, mangonels or flooding, nor cut off food or water from the rebels. However, if women or children are not at risk of being hurt, then weapons of mass destruction may be used. Ibn Ḥazm, however, adds that if fire or flooding is used, the rebels must be given an access or a safe pathway to escape death and surrender.[778] He vehemently rejects the Ḥanafī argument that the ruler does not have jurisdiction to punish crimes committed in rebel territory.[779] He also refuses to recognize any legal acts or adjudications performed in rebel territory. When the rightful ruler defeats the rebels, he should recollect all taxes, void all adjudications and repeat all criminal sanctions enforced by the rebels. The only possible exception is if there is not an established rightful ruler. In this situation, the rebels' legal acts and adjudications may be recognized and enforced.[780] Ibn Ḥazm concludes that once the rebels abandon their rebellion and stop fighting, the sanctity of their blood is restored and they become "our brothers [once again]."[781]

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[774] Ibid., vol. 11, 338.

[775] Ibid., vol. 11, 336.

[776] Ibid., vol. 11, 340-1.

[777] Ibid., vol. 11, 339-340.

[778] Ibid., vol. 11, 360.

[779] Ibid., vol. 11, 357-8.

Ibn Ḥazm's treatment of the subject of rebellion did not gain general acceptability nor become an established doctrine. However, as we will see, many later jurists, particularly from the Mālikī school, gravitated towards a more subjective and ideological position on rebellion. This is particularly so after the Mongol invasion in the 7th/13th century. Nonetheless, these jurists did not necessarily argue that a ruler could be declared a rebel. Rather, they argued that an unjust ruler should not be supported in his attempt to fight rebels.

The Shī'a

By the 5th/11th century, Shī'ī jurists had developed a substantial discourse on the *bughā*.[782] It is not clear to what extent the development of Shī'ī discourses on the subject was influenced by the rise of the Buwayhids in the 4th/10th century and their defeat by the Saljūks in the 5th/11th century. The Buwayhids are reported to have been Shī'ites particularly of the Zaydī persuasion.[783] It is possible that Shī'ī jurists responded to the Saljūk challenge by systematizing their discourses on rebellion. Nonetheless, this is unlikely because most of the Shī'ī discourses, at this stage, were concerned with responding to the Sunnī arguments about the religious status of those who rebelled against 'Alī. Furthermore, the majority of Shī'ī discourses in the 5th/11th century focus on addressing the status of those who rebel against the true and infallible *'imām*. Therefore, at this point of their development, there is a futuristic quality to Shī'ī discourses on the subject. They address the status of those who rebel against the true *'imām* when one eventually exists. In later stages, Shī'ī treatment of the subject of rebellion becomes largely indistinguishable from the Sunnī approach, and Shī'ī jurists no longer restrict themselves to addressing rebels against the infallible *'imām*.

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[780] Ibid., vol. 11, 352-4.

[781] Ibid., vol. 11, 360.

[782] Al-Ṣadūq (d. 381/991-2), *Man lā Yaḥduruhu al-Faqīh*, vol. 4, 68-9, addresses banditry but does not discuss rebellion. Al-Qāḍī al-Nu'mān does address rebellion in his *Da'ā'im al-Islām*. I address al-Nu'mān below.

[783] On this period of Shī'ī history, see Modarressi, *Crisis and Consolidation*, 96; Moojan Momen, *An Introduction to Shī'ī Islam* (New Haven: Yale University Press, 1985), 75 - 82. Momen argues that although the Buwayhids were Zaydīs, they also had strong 'Imāmī sympathies.

As noted above, the Shī'ī approach to rebellion is ideological but it is quite different from Ibn Ḥazm's treatment. Ibn Ḥazm scrutinized the content of the rebel's interpretation, and classified rebels according to his assessment of the justness of their cause. The Shī'ī treatment, for the most part, did not scrutinize the content of the rebel's interpretation. Rather, it focused on whether the *'imām* is rightful according to the criteria of Shī'ī theology. If the *'imām* is rightful, then all those who disobey him are rebels regardless of the specific content of their interpretation. If the ruler is not rightful, Shī'ī jurisprudence in the 5th/11th century takes a rather neutral or non-committal position.

Abū Ja'far al-Ṭūsī (d. 460/1067), one of the most important Shī'ī jurists of the 5th/11th century, emphasizes the imperative of obeying the *'imām* and the prohibition against dissenting from the *jamā'a*.[784] In this context, his discourse is hardly different from his Sunnī counterparts who emphasize the need for order and stability. Al-Ṭūsī asserts that anyone who rebels against a just ruler (*'imām 'ādil*), violates his oath of allegiance and disobeys the ruler's commands is a *bāghī*, and it is permissible for the ruler to fight him.[785] The fact that al-Ṭūsī uses the expression "a just *'imām*" gives the impression that, like some of his Sunnī counterparts, he is arguing that only those who rebel against *any* just ruler are to be considered *bughā*. This impression is reinforced by the fact that al-Ṭūsī asserts that if a group rebels against an unjust ruler, they should not be fought under any circumstances.[786] However, it is unlikely that al-Ṭūsī is arguing that any just ruler should be obeyed, and that those who refuse to do so are rebels.[787] A substantial portion of al-Ṭūsī's arguments are focused on analyzing the status of the companions who rebelled against ʻAlī. He argues that although these rebels outwardly remained Muslims, in reality they have become unbelievers by rebelling against the true *'imām*.[788] He goes on to note that although the Sunnīs have argued that the term *bughā* does not connote reproachment (*laysa 'ism dhamm*), they are mistaken. He adds that some of the Sunnīs have gone so far as to maintain that the *bughā* are similar to *mujtahids*, and that sedition is similar to juridical disagreements. This is due to the fact that the Sunnīs have maintained that the *bughā* remain believers because of their reliance on a plausible *ta'wīl*. Al-Ṭūsī argues that the Sunnī position is untenable. *Baghy* is an act of disbelief, and the existence of a plausible *ta'wīl* is irrelevant if the rebellion is against a rightful *'imām*.[789] The difference between the Sunnī and Shīʻī approach is further clarified by Abū al-Qāsim al-Mūsawī al-Sharīf al-Murtaḍā (d. 436/1044-5) who claims that of all the Muslim sects, the 'Imāmī Shīʻa alone held that whoever rebels against *the* just *'imām*, it is as if he has rebelled against the Prophet himself. Al-Murtaḍā asserts that obedience to the true *'imām*

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[784] Al-Ṭūsī, *al-Mabsūṭ*, vol. 7, 263. Al-Ṭūsī studied Shāfi'ī jurisprudence before studying under the Shī'ī, al-Shaykh al-Mufīd (d. 413/1022). He was no stranger to the ordeal of persecution. His books were burned and he went into hiding and eventually settled in Kūfa. See al-Dhahabī, *Siyar*, vol. 18, 334-5.

[785] Abū Ja'far Muḥammad b. al-Ḥasan b. 'Alī al-Ṭūsī, *al-Nihāya fī Mujarrad al-Fiqh wa al-Fatāwa* (Qum: Intishārāt Quds Muḥammadī, n.d.), 296. In Idem, *al-Rasā'il al-'Ashr* (Qum: Mu'assasat al-Nashr

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al-Islāmī, n.d.), 244, he adds that the rebels should not be fought except by the express permission of the ruler. Also see Idem, *al-Mabsūṭ*, vol. 7, 263.

[786] Al-Ṭūsī, *al-Nihāya*, 296; idem, *Tahdhīb*, vol. 6, 145.

[787] Wilferd Madelung, "A Treatise of the Sharīf al-Murtaḍā on the Legality of Working for the Government (*Mas'ala fī 'l-ʻAmal maʻa 'l-Sulṭān*)." *Bulletin of the School of Oriental and African Studies*, 43 (1980), 18-31. Argues that the Imāmites, at this time, had already recognized the possibility of a just ruler other than the infallible 'Imām. This proposition would appear to contradict my argument above. However I am not necessarily challenging Madelung's thesis. I am arguing that at this point in 'Imāmī jurisprudence, the law of rebellion remained primarily a field for sectarian debate.

[788] Al-Ṭūsī, *al-Mabsūṭ*, vol. 7, 264; al-Mufīd (d. 413/1022), *'Awā'il*, 42, asserts that the 'Imāmīs, Zaydīs and the Khawārij agreed that those who rebelled against ʻAlī are considered unbelievers.

[789] Al-Ṭūsī, *al-Mabsūṭ*, vol. 7, 264; see also al-Murtaḍā, *al-'Intiṣār*, 233.

of the age is a great act of religious devotion, and that no prayers or any other religious act will compensate for the sin of disobeying the true *'imām*.[790] He then explains that the *'imām* must be infallible, and that all of those who believe in the infallibility of the *'imām* also believe that the *bughā* are unbelievers.[791]

Having asserted that the *bughā* are unbelievers, logically it would seem to follow that the *bughā* would be treated as apostates or infidels. Surprisingly, however, the Shī'ī discourses on the treatment of rebels are substantially similar to Sunnī doctrines.[792] In order for a group to qualify as *bughā* it must have a plausible interpretation or cause, and a degree of power or strength (*min'a* or *shawka*). If a group rebels without *shawka*, they should be treated as common criminals, but if a group rebels without a plausible *ta'wīl*, they should be treated as bandits.[793] Under all circumstances, as long as an individual or group does not rebel or violate the law, the *'imām* should not persecute or fight such an individual or group even if their system of thought is offensive to the *'imām*.[794] If a group which has a *shawka* and a *ta'wīl* does not rebel but otherwise violates the law, the *'imām* should hold them liable, and should prosecute them for the specific crimes committed.[795]

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[790] Al-Murtaḍā, *al-'Intiṣār*, 231, 233.

[791] Ibid., 232. Other Shī'ī jurists refer to al-*'imām al-'adl* (the just *'imām*) or to al-*'imām al-ḥaqq* (the true *'imām*). See al-Qāḍī Ibn al-Barrāj al-Ṭarabulusī (d. 481/1088-9), *al-Muhadhdhab*, ed. Ja'far al-Subḥānī (Qum: Mu'assasat al-Nashr al-Islāmī, 1409 AH), vol. 1, 299, 326.

[792] Al-Murtaḍā argues that the *bughā* should not be treated as apostates. Rebels against the true *'imām* are considered unbelievers in the eyes of God in the Hereafter. Nevertheless, on this earth they are treated as sinful Muslims, al-Murtaḍā, *al-'Intiṣār*, 232. According to al-Ṭūsī, *al-Mabsūṭ*, vol. 7, 278 the *bughā* are to be treated on this earth as sinful Muslims or unbelievers, depending on the specific legal issue in question.

[793] Al-Ṭūsī, *al-Mabsūṭ*, vol. 7, 264, 268.

[794] For support, al-Ṭūsī cites the precedent of the Prophet's conduct with the hypocrites of Medina. He argues that although the Prophet was well-aware of their hypocritical beliefs, he did not persecute them. However, he adds that if the rebels malign or slander the *'imāms*, they should be killed, al-Ṭūsī, *al-Mabsūṭ*, vol. 7, 269-70. Al-Ṭarabulusī, *al-Muhadhdhab*, vol. 1, 325, states that the loyalists should not initiate the fighting.

[795] Al-Ṭūsī, *al-Mabsūṭ*, vol. 7, 268. It is not clear whether al-Ṭūsī is arguing that the group should be held collectively liable for the crimes committed by some of its members, or whether only the individual members who committed the crime are to be held liable.

According to Shīʻī sources, the existence of a *ta'wīl* is what, for the most part, distinguishes a rebel from a bandit. Shīʻī sources, however, do not elaborate upon what would be recognized as a plausible *ta'wīl*,[796] and, at the same time, these sources adopt a rather broad definition of banditry. This contributes to a blurring of the line between a rebel and a bandit. For example, al-Ṭūsī maintains that a bandit is one who uses weapons to terrorize people in a city or desert, or over land or sea.[797] The primary legal element that distinguishes bandits from others is that bandits spread terror and render their victims helpless by denying them the possibility of rescue.[798] This, of course, could include a rather broad array of criminal activity that is not necessarily limited to an intent to usurp property. In fact, al-Ṭūsī concedes that banditry is not necessarily limited to crimes motivated by a desire to steal or usurp property.[799] Under such a broad definition of banditry, crimes that are of a political nature could be considered a form of banditry. For instance, al-Ṭūsī argues that if a group assassinates a governor or some other official, even if inside a town, this group should be treated as bandits.[800] It is not clear whether al-Ṭūsī is arguing that assassinators of public officials are bandits, even if they have a legally recognizable *ta'wīl*. Put differently, if the group which carried out the assassination has a plausible *ta'wīl*, is the group to be treated as bandits or rebels? The difference, of course, is significant because of the harsh penalties imposed on bandits, and because the rules of engagement that apply to rebels do not apply to bandits.[801]

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[796] Abū al-Ṣalāḥ Taqī al-Dīn b. Najm al-Dīn 'Abd Allāh al-Ḥalabī (d. 447/1055), *al-Kāfī fī al-Fiqh*, in Alī Asghar Murwārīd, ed., *Mawsūʻat Silsilat al-Yanābīʻ al Fiqhiyya* (Beirut: Dār al-Turāth and al-Dār al-'Islāmiyya, 1990), vol. 9, 34, argues that a recognizable *ta'wīl* is that which claims that something prohibited is allowed or vice versa, or that which would deny a legal obligation such as the obligation to obey the rightful *'imām* as long as it is supported by some rational argument (*bi al-'istidlāl*).

[797] Ibid., vol. 8, 47, 50. However, in Idem, *al-Nihāya*, 297, the author adds that a bandit is one who intends to usurp money or property. But he also states that a bandit is anyone who terrorizes people in Muslim or non-Muslim territory, Ibid., 720. The same is repeated in al-Ṭarābulusī, *al-Mahadhdhab* in *Mawsūʻat Silsilat al-Yanābīʻ*, vol. 10, 170. Abū Ya'lā Ḥamza b. 'Abd al-'Azīz al-Daylamī Sallār (d. 448/1056-7), *al-Marāsim al-ʻAlawiyya* in *Mawsūʻat Silsilat al-Yanābīʻ*, vol. 10, 111, argues that a bandit is one who uses force in the land of Islam and causes corruption. Al-Ḥalabī (d. 447/1055), *al-Kāfī fī al-Fiqh*, in *Mawsūʻat Silsilat al-Yanābīʻ*, vol. 9, 34, argues that bandits are those who terrorize the wayfarer and cause corruption in *dār al-'amn* (the abode of peace and security). Al-Mufīd, *al-Muqniʻ fī al-'Uṣūl wa al-Furūʻ*, in *Mawsūʻat Silsilat al-Yanābīʻ*, vol. 10, 44, states that bandits are misfits who use weapons in Muslim territory to usurp money. 'Alā' al-Dīn Abū al-Ḥasan b. Abī al-Faḍl al-Ḥasan b. Abī al-Majd al-Ḥalabī (d. late 5th/11th century), *Ishārat al-Sabaq 'ilā Maʻrifat al-Haqq* in *Mawsūʻat Silsilat al-Yanābīʻ*, vol. 9, 197, states that bandits are those who cause corruption on the earth and commit highway robbery. Even among jurists writing in the late 6th/12th century, the categories of *baghy* and *ḥirāba* are at times confused. For example, see Ḥamza b. 'Alī b. Zuhra al-Ḥusaynī al-Ḥalabī (d. 585/1189), *Ghunyat al-Nuzūʻ 'ilā ʻIlm al-'Uṣūl wa al-Furuʻ*, in *Mawsūʻat Silsilat al-Yanābīʻ*, vol. 9, 153.

[798] Al-Ṭūsī, *al-Mabsūṭ*, vol. 8, 50.

[799] Ibid., vol. 8, 48, al-Ṭūsī argues that if the bandits committed murder while having formed an intent to usurp property, they must be killed regardless of whether they, in fact, usurped property or not. The *'imām* does not have discretion to pardon them or to impose a lesser penalty. If the bandits did not intend to usurp property but committed murder anyway, the *'imām* does have discretion.

The rules of engagement that apply to rebels are rather tolerant. If a group, while enjoying *shawka* and a plausible *ta'wīl*, commits a general act of rebellion, the *'imām* should warn them, and inquire about their grievances. If they mention an injustice, it should be redressed.[802] The 'Imāmī Shī'ī rules of conduct of war are similar in certain respects to those of the Ḥanafī, and in other respects, to Shāfi'ī doctrines. Similar to the Ḥanafī position, a basic distinction is maintained between rebels who have reinforcements (*fi'a*) and those who do not. If the rebels have reinforcements, the wounded and fugitive may be dispatched. However, similar to the Shāfi'ī position, the captive may not be executed. A prisoner is held until the rebels have been thoroughly defeated or until he repents and takes the oath of allegiance, whichever is first. Rebel property, other than property found in the war camp, may not be confiscated, and under all circumstances rebels cannot be enslaved. Importantly, once the rebels lay down their weapons and surrender, they may not be fought or killed.[803]

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[800] Ibid., vol. 7, 270. Al-Ṭūsī, however, notes that some jurists have argued that such a group should not be treated as bandits, and therefore, the imposition of a criminal sanction against the group is not mandatory.

[801] See, for example, al-Ḥalabī, *Ishārat al-Sabaq 'ilā Ma'rifat al-Haqq* in *Mawsū'at Silsilat al-Yanābī'*, vol. 9, 196.

[802] Al-Ṭūsī, *al-Mabsūṭ*, vol. 7, 265; Al-Ḥalabī, *al-Kafī*, in *Mawsū'at Silsilat al-Yanābī'*, vol. 9, 34, 37-8. Al-Ṭarabulusī, *al-Muhadhdhab*, vol. 1, 325, argues that it is recommended that the *'imām* warn the rebels before fighting them, but if the rebels are aware of the illegality of their actions, the *'imām* does not need to warn them.

[803] Al-Ṭūsī, *al-Mabsūṭ*, vol. 7, 266-9, 271; Idem, *al-Nihāya*, 296-7; Abū al-Qāsim 'Alī b. al-Ḥusayn al-Mūsawī al-Sharīf al-Murtaḍā (d. 436/1044-5), *al-Masā'il al-Nāṣiriyāt* in *Mawsū'at Silsilat al-Yanābī'*, vol. 9, 27. Al-Ḥalabī, *al-Kāfī fī al-Fiqh*, in *Mawsū'at Silsilat al-Yanābī'*, vol. 9, 34, 37-8; al-Ḥalabī, *Ishārat al-Sabaq 'ilā Ma'rifat al-Ḥaqq* in *Mawsū'at Silsilat al-Yanābī'*, vol. 9, 190, 196. Al-Ṭarabulsī,

Al-Ṭūsī argues that it is not permissible for the just *'imām* to use fire or mangonels against the rebels. These weapons, al-Ṭūsī contends, kill indiscriminately, and the *'imām* is not allowed to kill other than those who fight him. Like his Sunnī counterparts, al-Ṭūsī asserts that these weapons may be used only in cases of necessity. However, he goes further, and does not leave the determination of whether a case of necessity exists to the discretion of the *'imām*. He argues that a case of necessity only exists in two distinct situations: 1. The rebels use these weapons first and so the *'imām* is forced to use the same type of weapons in self-defense; 2. The rebels surround the *'imām* from every side. In both these situations, the *'imām* may use such weapons to create an opening from which he and his troops can escape.[804] Al-Ṭūsī similarly restricts the discretion of the *'imām* over the issue of who may be asked to assist in fighting the rebels. He argues that the killing of the fugitive, captive or wounded is an injustice and a transgression. Therefore, the *'imām* may not seek the aid of any party which will commit such infractions. If it becomes necessary to seek the aid of such a party, the *'imām* may do so, however only under two conditions. Al-Ṭūsī reproduces the two conditions found in Shāfi'ī jurisprudence: 1. There is no alternative, and no other party that can assist in fighting the rebels; and 2. The 'imām would have sufficient power and force to prevent the killing of the captive, wounded and fugitive. If either of these conditions does not exist, then the *'imām* cannot seek the aid of a party that might violate the rules of engagement.[805]

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al-Muhadhdhab, vol. 1, 325-6, asserts that even in the heat of battle, if a rebel lays down his weapon, asks for a safe conduct and indicates a willingness to obey the true *'imām*, he may not be killed. However, in al-Ṭūsī, *Tahdhīb*, vol. 6, 144, and Idem, *al-Rasā'il*, 244-5, the author asserts that if the rebels have a *fi'a*, the prisoners may be executed. In *Tahdhīb*, vol. 6, 154-5, al-Ṭūsī states that 'Alī did not enslave the rebels because he wanted to set a precedent which would protect his Shī'a after him. Nonetheless, when the Qā'im returns he will kill and enslave the unjust. Modarressi, *Crisis and Consolidation*, 6, describes the Qā'im as "a millenarian figure" who is "a revolutionary leader from the House of the Prophet [who] would rise up, overthrow the unjust government, and establish the rule of justice and truth." Also see Momen, *An Introduction*, 165-6.

[804] Al-Ṭūsī, *al-Mabsūṭ*, vol. 7, 275.

[805] Ibid., vol. 7, 274. It is likely that al-Ṭūsī simply borrowed these two conditions from Shāfi'ī jurisprudence. As we saw earlier, these conditions were adopted as a response to the Ḥanafī claim that the captive, wounded and fugitive may be dispatched as long as the *bughā* have a *fi'a*. Al-Ṭūsī, himself, argues

Importantly, al-Ṭūsī argues that *'ahlal-dhimma* should not be asked to assist in fighting Muslim rebels because the point of fighting the *bughā* is to return them to the fold, and not to exterminate them.[806] *'Ahl al-dhimma*, however, cannot be trusted to observe this goal. Furthermore, because the rebels are Muslims, under no circumstances may the *'imām* agree to a termination of the fighting on the condition that the rebels pay a tribute or surrender hostages.[807]

Despite the fact that the *bughā* were considered unbelievers for opposing the true *'imām*, the rules of conduct of war do not materially differ from the rules advocated by the schools that considered the rebels errant Muslims. In fact, al-Ṭūsī consistently asserts that the rebels continue to enjoy the sanctity and protection afforded by Islam. This is rather powerful evidence of the persuasive moral impact that the discourses on rebellion have achieved by the 5th/11th century. The notion that there must be limits imposed on the discretion of a ruler in the conduct of warfare against Muslim rebels had become firmly established. Even the schools that argued that a legitimate ruler should have a near-absolute moral claim to power, or that a rightful ruler is infallible, were not willing to leave the conduct of warfare against Muslim rebels to the ruler's unfettered discretion. At this stage in Shi'ī jurisprudence, by definition, the *bughā* are those who rebel against the true *'imām* who has an absolute moral claim to power. The fact that the rebels rely on a plausible *ta'wīl* does not endow them with a relative moral claim, but simply sets them apart from bandits, and saves them from the harsh penalties that apply to the crime of banditry. This means that rebels are a different type of criminal from bandits, however, it does not mean

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that if a *fi'a* exists the wounded and fugitive may be killed. Nonetheless, it is likely that al-Ṭūsī has the Ḥanafīs in mind when he insists upon these two conditions.

[806] Ibid., vol. 7, 273-4. The author also adds that if the *'ahlal-dhimma* support the *bughā*, their covenant with Muslims is abrogated. However, if the *'ahlal-dhimma* claim that they were forced or that they, in good faith, believed that it was legal to support the rebels, they are to be believed, and their covenant should not be abrogated.

[807] Ibid., vol. 7, 271-2. Al-Ṭūsī, however, argues that if the rebels ask for a cease-fire, promise to release the prisoners of war held by them, and offer hostages as surety, the hostages may be accepted from them. But if the rebels renege on their promise and execute the prisoners, the hostages may not be killed, and in fact, once the fighting ends the hostages must be released.

that they are not criminals at all. This is why al-Ṭūsī refuses to exempt the rebels from liability and refuses to recognize the validity of their legal acts.

Al-Ṭūsī argues that if the loyalists destroy life or property before the rebellion commences or after the rebellion ends, the loyalists should be held liable. This is because until the rebellion actually commences, no crime has been committed. The rebels, however, are liable for life and property destroyed before, during and after the rebellion. Al-Ṭūsī concedes that many jurists have argued that the rebels should not be held liable for life and property destroyed during the course of their rebellion, and that this rule had become firmly established by *ijmā'* (consensus). He, however, denies that an *ijmā'* exists on this matter because Shī'ī jurists have never accepted this position. As long as the Shī'a do not agree with the non-liability rule all claims to a supposed consensus are unfounded.[808] Moreover, al-Ṭūsī contends that the loyalists have jurisdiction over all crimes committed in rebel territory, and that all legal acts performed by the rebels in such territory are null and void.[809] Taxes or alms collected by the rebels should be re-collected.[810] The testimony of their witnesses should not be accepted in court because the rebels are sinful and, hence, are not of just character. Furthermore, their adjudications, regardless of their technical correctness or fairness, are to be abrogated because rebel judges were not properly appointed by the *'imām*.[811] Al-Ṭūsī does not fully explain the reasoning behind these rather uncompromising positions. Nonetheless, he asserts that funeral prayers should not be performed on dead rebels because they are *kuffār* (unbelievers).[812] Therefore, rebels are to be treated on this earth as Muslims because as far as the temporal laws are concerned, they remain outwardly believers.[813] However, their legal acts lack legitimacy because inwardly and as far as the Hereafter is concerned, they are unbelievers. This lack of legitimacy is not cured even if the rebels usurp power or gain control over a territory.

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[808] Ibid., vol. 7, 267.

[809] Except that *hudūd* (specific criminal sanctions) applied by rebels should not be repeated out of mercy and compassion for the penalized. Ibid., vol. 7, 276, 280.

[810] However, in order to alleviate potential hardship, the *'imām* may forgive the assessed taxes and alms, and not re-collect them, Ibid., vol. 7, 276.

[811] Ibid., vol. 7, 277-8.

[812] Ibid., vol. 7, 278. Al-Ṭūsī also contends that loyalists killed in battle are martyrs.

All of the discussion above is premised on the assumption that a rightful 'Imām would, in fact, exist, and that the rebels would oppose such a rightful ruler. Nonetheless, for the 'Imāmī Shī'ites, this largely remained a hypothetical because Shī'ī jurists continued to live under what they considered unjust and illegitimate rulers. This situation prompted Shī'ī jurists to deal with two significant issues: One, should a true believer revolt against an illegitimate ruler; and two, should a true believer assume an official post under an illegitimate government? Ja'far al-Ṣādiq in the 2nd/8th century had already forbidden his followers from joining any armed rebellion.[814] Therefore, 'Imāmī Shī'ites do not focus on whether one should instigate an armed rebellion, rather they focus on whether it is permissible to enjoin the good and forbid the evil under an illegitimate government. Al-Ṭūsī, for instance, cites the *ḥadīth* which asserts that the best form of *jihād* is a truthful word uttered before an unjust ruler, and argues that as a general matter one should enjoin the good and forbid the evil. Al-Ṭūsī, however, notes that there are two important qualifications to this general obligation. One should reasonably believe that enjoining the good and forbidding the evil will be effective. Furthermore, a believer does not have an obligation to enjoin the good and forbid the evil if such an activity will result in harm (*mafsada*) such as placing him or others in serious danger. A believer does not need to be certain that such harm will result; it is sufficient that he or she believe that it is probable that such harm would, in fact, occur.[815]

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[813] Al-Ṭūsī reports that early Shī'ī jurists had argued that selling weapons to the *bughā* of al-Shām ('Umayyads) is not permitted unless such weapons are going to be used against non-Muslim enemies such as the Byzantiums. If one sells weapons, however, to the *bughā* when they are fighting the Ahl al-Bayt, that person becomes an unbeliever. If there is a cease-fire between the *bughā* and the loyalists, one may sell things such as horse saddles and shields to the *bughā*. See al-Ṭūsī, *al-'Istibṣār*, vol. 3, 57-8.

[814] See Modarressi, *Crisis and Consolidation*, 7-8.

As to serving as a public official under an illegitimate government, a believer may, in fact, accept such a position as long as certain conditions are met. The laws that a believer is asked to implement must be consistent with the dictates of Sharī'a. Furthermore, the believer must serve the Sharī'a, and not the illegitimate government, while believing that he has been duly delegated by the rightful ruler to do so, even if one does not exist. In other words, the believer should believe that his source of empowerment is a fictitious rightful ruler, and should serve the law of God, and not the unjust rulers in power. If the illegitimate ruler commands the believer to enforce laws that violate the Sharī'a, then the believer may not acquiesce, and must promptly resign his position. Nonetheless, if the believer is forced by threat of harm to remain in his position, and enforce such laws, then dissimulation (*taqiyya*) is permitted. In order to protect himself or others, the believer may remain in his position and enforce the ruler's illegal orders as long as such orders do not include unjustly killing someone. Dissimulation is never permitted if it means enforcing a command to kill an innocent person.[816]

The exposition above is rather cryptic and formulaic, and it creates many points of ambiguity. For instance, considering that there is no single institution that authoritatively defines Sharī'a, it is not clear how one is to decide whether the ruler's commands are illegal. Furthermore, it is not clear what type of threat of harm would permit one to cooperate in the enforcement of illegal orders. It is also not clear what is meant by a threat to the life of an innocent person. Are individuals who refuse to recognize the rightful *'imām* (i.e. Sunnīs) innocent? Does the prohibition apply only to commands that unjustly execute a person or does it also apply to equally dramatic measures such as long term imprisonment or the use of torture? We will revisit these issues later.[817] For our purposes at this point, it is not necessary to explore the full implications of the doctrine of dissimulation. What is material is that Shī'ī jurists, like their Sunnī counterparts, were willing to participate and partake in the institutions of society even if these institutions were unjust or illegitimate. Even the duty to enjoin the good and forbid the evil before an unjust or illegitimate authority became qualified by a balancing act. One needs to weigh the costs and benefits of taking an active role, and if the harm outweighs the good one needs to refrain from needlessly endangering himself or others. However, Shī'ī jurists were not willing to abandon the ideal in its entirety. They imply that those who rise against an unjust or illegitimate ruler are not rebels at all, and they explicitly state that one should not assist an unjust ruler in fighting or persecuting rebels. This, of course, is consistent with the argument that dissimulation is not permitted if it means killing an innocent person. Arguably, rebels fighting against an unjust or illegitimate ruler are innocent, and a Shī'ī may not take part in their slaughter.

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[815] Al-Ṭūsī, *al-Rasā'il*, 245; Idem, *Tahdhīb*, vol. 6, 170; Idem, *al-Nihāya*, 300. Al-Ḥalabī, *Ishārat al-Sabaq* in *Mawsū'at Silsilat al-Yanābī'*, vol. 9, 198, argues that it is sufficient that a believer would suspect that harm will befall him or others in life or property.

[816] Al-Ṭūsī, *al-Nihāya*, 301. Al-Mufīd, *'Awā'il*, 118, 120, asserts that assisting or participating in the propagation of injustice or oppression is not permitted. However, assisting illegitimate rulers in lawful and just causes is permitted. He also adds that dissimulation is not permitted if the result will be to place the life of an innocent person at risk or if dissimulation means that the true religion will be corrupted. In Idem, *al-Muqni'a fī al-'Uṣūl wa al-Furū'*, in *Mawsū'at Silsilat al-Yanābī'*, vol. 9, 15, he adds that a believer may not accept work for unjust rulers unless he intends to use his position to help the true believers (i.e. other Shī'ites). Also, he argues that a believer may implement executive orders but may not assist in initiating or creating new executive orders. For a study on the usage of dissimulation, see Devin J. Stewart, "*Taqiyyah* as Performance: The Travels of Bahā' al-Dīn al-'Āmilī in the Ottoman Empire (991-93/1583-85)," *Princeton Papers: Interdisciplinary Journal of Middle Eastern Studies* 4 (Spring, 1996): 1-70.

A useful point of comparison to the 'Imāmī Shī'ī discourses are the discourses of the Isma'īlī al-Qāḍī al-Nu'mān (d. 363/974) who reflects a very different perspective. Al-Nu'mān was a supporter of the early Fāṭimid dynasty in Egypt, and he served in various capacities under four consecutive Fāṭimid caliphs, al-Mahdī (r. 297/909 -322/934), al-Qā'im (r. 322/934 - 334/946), al-Manṣūr (r. 334/946 - 341/953), and al-Mu'izz (r.

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[817] On the legality of living and working under an unjust government and dissimulation see, Madelung, "A Treatise," 18-31; Etan Kohlberg, "Some notes on the Imāmī-Shī'ī views on *taqiyya*," *Journal of the American Oriental Society* 95 (1975): 395-402; Idem, "The Development of the 'Imāmī Shī'ī Doctrine of Jihād," *Zeitschrift der Deutschen Morgenlandischen Gesellschaft* 126 (1976): 64-86.

341/953 - 365/975). During the end of al-Qā'im's reign, al-Nu'mān was appointed as a judge, but he was also the most influential judicial functionary under the Fāṭimids until his death.[818] In Ismā'īlī theology, the *'imām* is considered divinely-guided and infallible. Therefore, he is the final authority for interpreting the law of God. For the Fāṭimid Ismā'īlīs, after the Qur'ān and *Sunna*, the infallible *'imām* is considered the most important source of law. The paradigms of Fāṭimid Ismā'īlī theology, and the close association of al-Qāḍī al-Nu'mān with the *'imāms* of his age make al-Nu'mān's discourse particularly useful for comparative purposes. Reportedly, al-Nu'mān consulted his contemporary *'imāms* on his theological and jurisprudential writings. Furthermore, his main work on law, *Da'ā'im al-Islām* (Pillar of Islam), became the official Fāṭimid *corpus juris*.[819] Considering the semi-official nature of his work, al-Nu'mān's exposition on the *bughā* becomes of particular interest.

Al-Nu'mān does deal with the issue of rebellion, but his discussion is rather terse. He does not address whether working with unjust rulers is permissible, and also does not address the issue of rebellion against unjust rulers. But he does cite the verse on *baghy* as the relevant verse on the subject, and otherwise focuses on the status of those who rebelled against 'Alī. Al-Nu'mān argues that those who rebelled against 'Alī committed acts of disbelief but were not unbelievers. Although they defied the laws and sanctities of God, they cannot be equated in status to those who never adopted Islām or believed in the Prophet. By the expression "those who rebelled against 'Alī," al-Nu'mān seems to mean non-Shī'ites in general, and not just Mu'āwiya, 'Ā'isha or the Khawārij. Therefore, he argues that because Sunnīs are not considered unbelievers, it is permissible to marry or inherit from them.[820] Nonetheless, other than the specific historical context of ʻAlī, it is not clear who al-Nuʻmān means by the word *bughā*. He does not define rebellion, and does not engage in a substantive discussion about the justness or unjustness of the rebels. He simply lays out the rules of conduct in dealing with the *bughā*. At one point, he cites reports which assert that the *bughā* should be fought in the same way unbelievers are fought.[821] However, rather inconsistently, a bit later, he argues that if the *bughā* have reinforcements then the wounded, fugitive and captive may be dispatched. If, however, they do not have reinforcements, the *bughā* may not be dispatched.[822] Significantly, al-Nuʻmān does not discuss the concept of *ta'wīl* or *shawka*. However, in one of the extant manuscripts of al-Nuʻmān's book, it states that if the *bughā* fight while relying on a *ta'wīl*, they are not liable for life or property destroyed during the course of their rebellion.[823] One cannot exclude the possibility that this passage was a later addition by a copyist who might have wanted to bring al-Nuʻmān's discourses in greater conformity with Muslim discourses in general. This possibility is supported by the fact that in all of the other manuscripts, al-Nuʻmān argues that the *bughā* should not be held liable only if the particular offender of a specific offense is not known. In other words, the *bughā* are not collectively liable for life or property destroyed during the course of the rebellion. However, if the particular offender responsible for a specific act can be identified, such an offender must be held liable.[824] This, of course, is a far more limited exemption from liability than the added passage implies. On issues related to the sanctity of the *bughā*, al-Nuʻmān adds that once the *bughā* repent and abandon the status of *baghy*, their properties must be returned to them.[825] Al-Nu'mān's discussion on banditry is equally terse, and does not help in distinguishing a *bāghī* from a bandit. After citing the incident of the 'Urayna, he states that bandits are those who attack travelers and usurp their properties. Al-Nu'mān adopts a position of *takhyīr* but argues that the ruler should punish bandits in proportion to their crime.[826]

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[818] A. Fyzee, "Nu'mān," in *Encyclopedia of Islam*, 1st ed., vol. 6, 953-4; Idem, "Qadi an-Nu'man: The Fatimid Jurist and Author," *Journal of Royal Asiatic Society* (1934), 1-32.

[819] Farhad Daftary, *The Ismā'īlīs: Their History and Doctrines* (Cambridge: Cambridge University Press, 1990), 250, 252-3; Paula A. Sanders, "The Fāṭimid State, 969-1171," in *The Cambridge History of Egypt*, 158. Reportedly, the Caliph al-Mu'izz commissioned the writing of the *Da'ā'im*, see Paul Walker, "The Ismā'īlī Da'wa and the Fāṭimid Caliphate," in *The Cambridge History of Egypt*, 134. It is also reported that al-Mu'izz edited and revised the *Da'ā'im*, see Ismail K. Poonawala, "Al-Qāḍī al-Nu'mān and Isma'īlī Jurisprudence," in *Mediaeval Isma'ili History and Thought*, ed. Farhad Daftary (Cambridge: Cambridge University Press, 1996), 126.

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[820] Al-Nuʻmān, *Daʻāʼim*, vol. 1, 388.

[821] Ibid., vol. 1, 393.

[822] Ibid., vol. 1, 394.

[823] Ibid., vol. 1, 395 ff 2.

[824] Ibid., vol. 1, 396-7.

In evaluating al-Nu'mān's discourse, the pertinent question becomes: who or what does al-Nu'mān mean by the expression *bughā*? Al-Nu'mān served a government which espoused a theology consistent with his own beliefs. He is reported to have become an Ismā'īlī early in his life, and had risen to a position of prominence in the hierarchy of the *da'wa* (the Ismā'īlī religious establishment).[827] Furthermore, the caliphs who al-Nu'mān served did, in fact, confront several serious rebellions.[828] But considering al-Nu'mān's background, did he mean to bind the Fāṭimid caliphs by the rules of conduct he enunciated when such caliphs deal with rebels? Was this discourse intended as a form of restraint on Fāṭimid caliphs or lower ranking officials such as governors or military chiefs? It is possible that he did not have in mind rebels against the Fāṭimid caliphs. But then the question is: Did he mean to argue that these are the rules of conduct that apply to Fāṭimids when they fight others (Ibāḍīs and non-Ismā'īlī Shī'ites of North Africa included)? Alternatively, did he mean to argue that these rules applied to Sunnīs when they fought non-Sunnīs? Al-Nu'mān's primary conceptual justification for the rules of conduct enunciated is similar to one of the points argued by the 'Imāmī jurists. Al-Nu'mān reports that the reason 'Alī treated the *bughā* with clemency and mercy was that 'Alī knew that his party or followers (Shī'a) would be defeated and oppressed by their opponents. 'Alī wished to set a precedent so that people would follow his example *when dealing with his party.* Significantly, al-Nu'mān then reports that 'Alī wished to send a message: If people failed to follow his example in dealing with the Shī'a, 'Alī wanted Muslims to be able to contrast his example with the behavior of his opponents, and thus, Muslims would be able to discern the just from the unjust party.[829] According to this logic, the role of the discourses is symbolic and communicative. Those who contrast 'Alī's clemency with the vindictiveness of his opponents would know that 'Alī was the just party. However, there is a certain tension in this discourse. The implication of this argument is that the enunciated rules of conduct are primarily for the protection of the Shī'a. On the other hand, 'Alī's conduct seems to be an independent moral value in itself; it distinguishes between the just and unjust, and between the righteous and errant. This would imply that 'Alī's conduct should be emulated and followed by any just party. From this perspective, al-Nu'mān's discourse would become binding on Fāṭimid caliphs or any other rulers who claim to be just.

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[825] Ibid., vol. 1, 397.

[826] Ibid., vol. 2, 474-5.

[827] Wilfred Madelung argued that al-Nu'mān was originally a Sunnī who later became an Ismā'īlī, see W. Madelung, "The Sources of Ismā'īlī Law," *Journal of Near Eastern Studies*, 35 (1976), 30. However, some scholars have challenged this claim, see Poonawala, "Al-Qāḍī al-Nu'mān," 136, n. 17.

[828] See Poonawala, "Al-Qāḍī al-Nu'mān," 119.

Al-Nu'mān does not resolve this tension, and one suspects that the tension or its resolution was not central to his concerns. Al-Nu'mān's primary interest was in the theological debates surrounding 'Alī and his opponents. His reiteration of certain positive rules of conduct was probably due to the influence of the collective legal culture of the jurists.[830] However, al-Nu'mān's legal borrowing is cryptic and unsystematic. In reading al-Nu'mān, one is struck with the similarity between his language and the language of Sunnī sources. One is also struck by his omission of several elements central to the discourses on rebellion, such as what constitutes a rebellion, the existence of a *ta'wīl* or

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[829] Al-Nu'mān, *Da'ā'im*, vol. 1, 394.

[830] Al-Nu'mān was well-aware of Sunnī jurisprudence and, in fact, wrote refutations and critiques of some Sunnī legal doctrines. See Poonawala, "Al-Qāḍī al-Nu'mān," 139, n. 45. Nevertheless, one of the reasons that the *Da'ā'im* was written was to reconcile between the Ismā'īlī and Sunnī schools of law. The point was to gain legitimacy by bringing Ismā'īlī law closer to Sunnī law. See Walker, "The Ismā'īlī Da'wa," 134; Poonawala, "Al-Qāḍī al-Nu'mān," 129.

shawka, various rules of engagement, and the validity of the legal acts of rebels. Like the 'Imāmī Shī'ites, al-Nu'mān was interested in proving 'Alī's high character. But considering the specific nature of Fāṭimid theology, and the institutional role of al-Nu'mān, it is doubtful that he sought to limit or restrain the Fāṭimid caliphs. Unlike the 'Imāmī Shī'ites, al-Nu'mān did not need to tailor his discussions to the issue of how one should deal with living under an unjust government. In other words, al-Nu'mān did not share the legacy and concerns of either the 'Imāmī or Sunnī jurists. Al-Nu'mān borrowed parts of the discourses of the jurists from the other legal traditions, but, ultimately, he did not share their purposes.

The Surviving Legacy of 'Aḥkām al-Bughā:

As argued earlier, *'aḥkām al-bughā* arose out of the context of the persistent 'Alid rebellions in the first two centuries of Islam. We also argued that Muslim jurists selectively treated historical and textual precedent in order to construct the discourse on rebellion. Muslim jurists insisted that rebels with a cause be treated according to certain tolerant or indulgent guidelines, and that rebels should not be seen as particularly reprehensible or evil. While Muslim jurists were not willing to endorse or legitimate all rebellions without limits, they also were not willing to give rulers unfettered discretion in dealing with rebels. As we noted earlier, there is evidence that the 'Umayyads and early 'Abbāsids attempted to invoke the *ḥirāba* verse in the context of dealing with rebels. Muslim jurists responded by creating a distinction between rebels and bandits, and insisted that the *ḥirāba* verse does not apply to rebels but applies to bandits. They also invoked the precedent of the companions who rebelled against 'Alī in order to argue that rebels are not necessarily decrepit or evil, and that rebellion is not necessarily a crime. In many ways, the discourse on rebellion directly correlates with the discourse on the legitimacy of the usurper. While, for the most part, the legitimacy of the usurper of power was recognized, Muslim jurists refused to de-legitimate all rebels or rebellions. By the 5th/11th century, the discourse on *'aḥkām al-bughā* had become firmly established, and clear schools of thought had developed on the issue of how rebels are to be treated. Although the Mālikī school continued to be ambiguous and rather ambivalent, as we will see, it was not too long before the Mālikīs adopted the discourse and started to construct their own specific positions on the matter. Even the 'Imāmī Shī'ites fully adopted the discourse despite the fact that, for them, it had a distinct futuristic and hypothetical quality to it. While the majority of Sunnī jurists focused on how rebels against any ruler should be treated, the 'Imāmī jurists focused on how rebels against a rightful ruler should be treated. 'Imāmī jurists insisted that rebels against a rightful ruler are not only sinners but unbelievers, and that rebellion against such a ruler is a crime. Remarkably, however, they argued that even if the ruler is rightful, he does not enjoy unfettered discretion in dealing with rebels. The 'Imāmī jurists also distinguished between a rebel and bandit, although the distinction was rather blurry and unclear. Significantly, if the rebellion is against an unjust or illegitimate ruler, the 'Imāmī position ends up being substantially similar to the Sunnī position; rebellion, as such, is not a crime.

Although the historical circumstances of the 2nd/8th century were materially different from the circumstances of the 5th/11th century, the discourse on rebellion had gained an autonomy of its own. One is left with the distinct impression that the Sunnī jurists of the 5th/11th century were still responding to the historical conditions of the 2nd/8th century. For one, most of the precedents cited are from the 1st to the 2nd century of Islam, and there is very little effort expended in addressing the weakening of the caliphate or the rise of the Fāṭimid dynasty, for example. As noted earlier, I am not arguing that law is completely autonomous. I am arguing, however, that the institutions of law, precedent and legal culture have a force of their own. As we saw, at least one jurist, al-Simnānī, complains that the discourse on rebellion had become disconnected from political reality, yet he is unable or unwilling to ignore a discourse which had become firmly established in his school. Nevertheless, it would be erroneous to claim that Muslim jurists repeated the doctrines of *'aḥkām al-bughā* unthinkingly and without regard to the realities of their day. Legal culture does change and does respond to political and social realities, but it often does so slowly and reluctantly. In fact, as we will see, Muslim jurists ultimately respond to the fragmentation and eventual destruction of the Abbāsid caliphate in a variety of ways. Furthermore, *'aḥkām al-bughā* became a means by which a moral, religious and, more importantly, a legal ideal is upheld against the pragmatic and undisciplined practices of the state. There is no contradiction between the argument that the discourses on *'aḥkām al-bughā* became established and spread through the force of legal culture and precedent, and the argument that *'aḥkām al-bughā* were upheld as a moral and legal ideal against the practices of the state. As we argued earlier, these discourses arose because of a political and social reality that existed in early Islam. Some of the most esteemed companions engaged in rebellions in early Islam. Furthermore, 'Alid rebels, and perhaps rebels such as Ibn al-Zubayr, were seen sympathetically by many early and late jurists. These historical realities contributed to the dynamics which produced *'aḥkām al-bughā*. As the culture of jurists developed, there was a further institutional incentive to develop and uphold the discourses on rebellion. As discussed earlier, there is no doubt that Sunnī jurists developed a cooperative relationship with the political institutions of the early 'Abbāsids, but these interests were not necessarily symmetrical nor in conformity with each other. Muslim jurists aspired to retain the right to represent and express the divine law, and hold the state accountable to that law. This explains why *'aḥkām al-bughā* were upheld as an ideal against the practices of the state. Nonetheless, this does not explain why the specific structure and terminology of *'aḥkām al-bughā* survived and spread in substantially the same format. The basic distinction between bandits and rebels, and the terminology of *ta'wīl* and *shawka*, as well as the basic expositions on recognizing the legal acts of rebels continued to be reiterated for well over a thousand years without a radical restructuring or reshaping of the discourse.[831] Responses to historical realities came in the form of technical, but significant, modifications to certain rules rather than in the form of a radical reinvention of the discourse. The remarkable spread and perseverance of *'aḥkām al-bughā's* terminology and categories is due to the imperative of legal culture and precedent.

Finally, as discussed earlier, the accepted contemporary scholarly, and, by now, the quite dogmatic view, is that Sunnī jurists by the 4th/10th century had become political quietists. But in light of the discourses on *'aḥkām al-bughā,* this view becomes untenable. It is not possible to describe the juridical positions as either quietist or activist. Sunnī juridical discourses did not consider rebellion a sin, and even the jurists, such as the Ḥanafīs, who did consider rebellion a sin were not willing to declare rebellion a punishable crime. In fact, as we will see, the idea that rebellion is not a sin or a crime continued to be advocated well after the 5th/11th century. Sunnī jurists before and after the 5th/11th century refused to unequivocally condemn or demonize all rebels. As would be expected from an established and institutionalized legal culture, Sunnī jurists upheld the need for stability and order. Even an unjust ruler is better than the anarchy that results from civil wars or rebellions. However, Muslim jurists continued to advocate the humane treatment of rebels, and, as argued next, reinterpreted and neutralized the traditions attributed to the Prophet which curse or excommunicate rebels. Importantly, as discussed next, many Sunnī, Zaydī and Ibāḍī jurists argued that a rebellion could be justified if the anticipated benefits of such a rebellion outweigh the perceived evils.

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[831] As Kraemer, "Apostates," 68-9, notes, the distinguishing of rebels from bandits was unusual in ancient legal systems. Yet, early Muslim jurists distinguished between ideologically motivated rebellions and acts of brigandage or banditry. The significant question is: Why has this theoretical distinction spread and survived in schools of thought of different political and social contexts? I would argue that the culture of legal borrowing played a major role.

CHAPTER 5

REBELLION, INSURGENCY AND BRIGANDAGE: THE DEVELOPED POSITIONS AND THE EMERGENCE OF TRENDS

The 'Abbāsid Caliphate was formally extinguished by the Mongols when they sacked Baghdād in 656/1258. Two centuries earlier, the caliphate had fallen under the strong influence of the Saljūk princes who seized Baghdād from the Buwayhids in 447/1055.[832] But, as noted earlier, the 'Abbāsid caliphate had become weakened to the point of impotence in the 4th/10th century. The weakening and eventual extinction of the 'Abbāsid caliphate posed a fundamental change in the political structures of the age. The caliphate, as a political and religious symbol, was seriously challenged, and the basis for legitimacy of one dynasty over another had become more problematic.[833] The Sunnī juridical response to these developments was neither uniform nor dogmatic. Sunnī jurists did not lend unrestrained support to whoever happened to be in power, and did not unequivocally condemn rebellion against unjust rulers.

Sunnī juridical doctrines on rebellion underwent major revisions and reconstructions after the 5th/11th century. Some of the revisions are likely to have been in response to the imperatives of legal culture, and were not related to the political or social developments of the age. For instance, the Mālikī school fully adopted the discourses on rebellion, and in fact, Mālikī jurists attributed many of their newly adopted positions to the early founders of the Mālikī school. Furthermore, Ḥanbalī jurists further developed the theoretical foundations for *'aḥkām al-bughā* without significantly altering their positive rulings in the field. But other changes are clearly related to political developments of the 7th/13th and 8th/14th centuries. For example, several jurists argued that the Mongols, even after converting to Islam, should be treated as bandits. In addition, many Shāfi'ī jurists adopted the Ḥanafī position on fighting rebels who had a *fi'a*. Importantly, the development of the legal discourses after the 5th/11th century were quite diverse and exhibited a variety of significant trends.

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[832] Al-Ẓāhir Baybars set up a shadow caliphate in Cairo in 659/1261. The caliphate in Egypt ended with the Ottoman conquest of in 923/1517. See Bosworth, *The New Dynasties*, 7-9; Lambton, *State and Government*, 138-9.

[833] Kennedy, *The Prophet*, 198-9. The Shī'ī Fāṭimids set up a caliphate in Egypt in 297/909 which came to an end with the Sunnī Ayyūbid conquest in 567/1171. The Ayyūbids were defeated in Egypt by the Mamlūks in 650/1252, and in Damascus and Aleppo by the Mongols in 658/1260. See Bosworth, *The New Dynasties*, 63, 70-5.

These trends cannot be broken down or understood in terms of traditional legal schools of thought. In other words, not all Shāfi'īs or Mālikīs, for instance, adopted the same positions. Rather, the various trends crossed school lines and transcended the corporate identity of specific schools. A high degree of commonality continued to exist within each specific school. Jurists, however, exhibited a considerable degree of independence in their treatment of rebellion. Considering the role of legal culture and the power of prior authority on the legal mind, this is a phenomenon that needs to be explained. Put differently, why didn't jurists adhere to the prior authority and corporate identity of the school of thought to which they formally belonged? One must emphasize that for the most part, the various jurists did, in fact, adhere to the inherited doctrines of their specific school of thought. Therefore, one will find that on the majority of issues, for example, Shāfi'ī jurists adhered to distinctly Shāfi'ī positions. Nonetheless, when it came to basic attitudes towards obeying and supporting those in power, the traditional boundaries of school doctrines tended to break down. The reason for this development, as explained earlier, is that the doctrines of rebellion in the 4th/10th and 5th/11th centuries were still in response to the political dynamics of the 2nd/8th and 3rd/9th centuries. However, especially after the Mongol invasions, the disparity between the inherited legal doctrines and the political realities had become not only undeniable but shocking. Many jurists reacted to the gap between political reality and legal doctrine by failing to respond at all, and continued to repeat the inherited traditions without further elaboration. Many other jurists were sufficiently disturbed by the disparity that they were willing to exercise a degree of initiative and independence. In other words, the evolving gap between the doctrines on rebellion and the political reality resulted in a degree of de-legitimation and deconstruction of the moral power of prior authority within each school. The balance between the need to uphold the integrity of a legal culture and the need to stay relevant in society tipped in favor of change. Under these circumstances, some jurists were willing to express views on the need to obey or support a ruler that did not necessarily coincide with the inherited precedent within their particular school.

Jurists responded to the disparity between the legal doctrine and socio-political realities in a variety of ways. The discourse on rebellion had become firmly established, but it had also become more diverse and complex. This diversity and complexity, as well as a degree of frustration, is well-represented in a *fatwā* issued by the Mālikī jurist Aḥmad al-Wansharīsī (d. 914/1508-9). In dealing with whether it is lawful to rebel against an unjust ruler, he starts out by complaining that the public or laity (*al-'āmma*) does not listen. He states:

> "The public has found it difficult to accept the *fatwā* [in this matter] and refused to abide by it. [But] it is not the fault of the laity rather it is the fault of that type of people [*dhālika al-ṣinf*] who lend credence to their dissension. They are either non-believers or Khawārij ... [who] permit rebellion against the unjust ruler. But the people of truth (*ahl al-ḥaqq*) who are the [true] people of *sunna* and tradition said that it is better to persevere in obeying the unjust ruler because sound principles dictate that the greater of two evils must be abandoned."[834]

Al-Wansharīsī's *fatwā* is important not because of what it says, but because of what it fails to state. Obviously, he is frustrated by the unwillingness of an undefined public to accept the idea that an unjust ruler should be obeyed. Although he accuses those who legalized rebellion of being unbelievers or seditious individuals, he is clearly referring to individuals who carry a degree of moral weight with the laity, and who are able to persuade this laity that rebellion is not a sin. The fact that he resorts to invoking the invariably vague notion of *ahl al-sunna* in support of his argument indicates that he is appealing to an assumed orthodoxy on the matter, and it also indicates that he is responding to an unyielding social reality. In other words, he is responding to an existing social dynamic that does not necessarily accept his unequivocal and dogmatic prohibition against rebellion. As such, al-Wansharīsī's frustration is real. It is very likely that al-Wansharīsī is not responding to unbelievers and Khawārij but that he is reacting to other jurists who advocate doctrines concerning rebellion that he finds divisive and objectionable. In fact, what al-Wansharīsī alludes to but tries to ignore is that by his age, there existed several juridical tendencies on rebellion, some of which were at odds with his own position.[835]

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[834] 'Aḥmad b. Yaḥyā al-Wansharīsī, *al-Mi'yār al-Mu'rib* ed. Muḥammad Ḥajjī (Beirut: Dār al-Gharb al-Islāmī, 1981), vol. 5, 34-5. The author goes on to argue that even if a ruler demands the payment of unjust taxes, he should be obeyed. Furthermore, he asserts that a ruler enjoys a status equivalent to the Prophet, and should be obeyed just as the Prophet was obeyed. The only difference is that in the case of a corrupt ruler, people should pray to God to guide the ruler away from injustice.

I will describe these various tendencies in turn. I have categorized these tendencies in terms of their attitude towards the inherited doctrines of rebellion, and their attitude towards the necessity of obeying and supporting those in power. Some jurists advocated unequivocal support for those in power, but otherwise did not revise or alter the rules of rebellion in any significant way. Other jurists agreed that those in power should be obeyed, but also expanded the scope and reach of the laws of rebellion in a technical but significant fashion. Some juridical views adopted a neutral stand and refused to support either the rulers or rebels, while other views sanctioned rebellion against unjust rulers without limitation. Under some of these positions the idea that rebellion against unjust rulers is justified, or at least tolerated, found support. One suspects that it is this diversity in juridical opinion which partly explains the tone of frustration found in al-Wansharīsī's *fatwā*.[836] I have categorized the various views and tendencies into two main categories: the traditional and revisionist trends. For the most part, the traditional trend did not alter or reconstruct the basic framework of *'aḥkām al-bughā*. The revisionist trend modified substantial and essential parts of the discourse.

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[835] Abū Zayd 'Abd al-Raḥmān b. Muḥammad b. Khaldūn (d. 808/1406), *al-Muqaddima* (Beirut: Dār 'Iḥyā' al-Turāth al-'Arābī, n.d.), 159-60, asserts that many of the *'āmma* (laity) and the *fuqahā'* (jurists) advocate or become involved in rebellions. These pious individuals, Ibn Khaldūn argues, do so believing that they are obeying God's command by enjoining the good and forbidding the evil. In reality, all they succeed in accomplishing is destroying themselves and others. Ibn Khaldūn argues that God did not command that people cast themselves unto ruin. God commanded people to resist evil only if they are able to do so effectively. He notes that many people follow in the footsteps of these misguided individuals. He concludes by recommending that if these rebels are insane, that they be treated, and if they are not insane they should be punished. Both al-Wansharīsī and Ibn Khaldūn are frustrated by the social and theological support given to the idea of rebellion.

The Traditional Trend

The traditional view inherited the developed doctrines of the law of rebellion, and continued to reiterate them without any substantial change. The basic doctrines of the law of rebellion distinguished between a bandit and a rebel, and held that if a group rebels while adhering to an interpretation and while enjoying an unspecified degree of strength or power, this group qualifies as *bughā*. As *bughā*, the group should be treated with a certain degree of tolerance, although Sunnī jurists disagreed on the specific treatment to be afforded to rebels. At a minimum, the majority of Sunnī jurists agreed that the rebels are not to be held liable for life and property destroyed during the course of their rebellion, and that, as a general matter, rebels may not be executed and their properties may not be confiscated. Of course, what could be considered traditional to each school differs according to the particular precedents of the school. For example, the traditional Ḥanafī position maintained that the rebels are sinners while the traditional Ḥanbalī view disagreed. Nonetheless, what characterizes what I described as the traditional trend is its resistance to change or revision. What also characterizes the traditional trend is its insistence on the principle that whoever is in power must be obeyed and supported, and that rebels be treated leniently.

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[836] Interestingly, al-Wansharīsī, himself, was the subject of persecution in Tilimsān. His house was raided and destroyed, and he escaped to Fez where he eventually died. See al-Ziriklī, *al-A'lām*, vol. 1, 269; al-Wansharīsī, *al-Mi'yār*, vol. 1, 3.

'Aḥkām al-bughā, as argued earlier, originated in the late 2nd/8th and early 3rd/9th centuries as a radical doctrine which was intentionally unhelpful to the state. It was sympathetic and intentionally tolerant of rebels. As argued earlier, it was asserted that *'aḥkām al-bughā* applied to rebels whether the ruler was just or not. The justness of the ruler was rendered an irrelevant consideration, and thus, a ruler could not argue that since he is just, he is not bound by *'aḥkām al-bughā*. But the dynamics of the discourses on rebellion had changed materially by the 6th/12th century. The traditional doctrines of *'aḥkām al-bughā* had become widely accepted in juridical circles, but the gap between the political realities and the legal discourse had become wide and apparent. Therefore, by the 6th/12th century, supporting the traditional inherited doctrines of *'aḥkām al-bughā*, without any material revision, had become an argument in favor of the *status quo*. In many ways, supporting the traditional doctrines on rebellion became a tacit acceptance of the irrelevance and marginality of the discourse. The traditional trend, which regurgitates the inherited doctrines without any material revision, tended to focus on the need to obey whoever was in power, just or unjust, and then quickly rehashed the technical rules relating to the treatment of rebels. The emphasis of the traditional trend is on the need to obey whoever is in power, and not necessarily on the treatment of the rebels. As such, the traditional trend emphasized the illegality of rebellion and not necessarily the broad applicability of *'aḥkām al-bughā*. Unlike the early discourses, the traditional trend was concerned not so much with giving *'aḥkām al-bughā* the broadest application possible, rather it was primarily concerned with discouraging rebellions.[837] The traditional trend is represented primarily by Ḥanbalī, and some Shāfi'ī and Ḥanafī jurists. Most Mālikī jurists

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[837] I do not want to overstate this point because, as we will see, even the traditional trend expended a considerable amount of energy in defending the theological status of certain rebels.

can be categorized under the traditional trend as well, but they represent a special case and will be dealt with separately below.

Jurists from within the traditional trend emphasize that regardless of how a ruler comes to power, he or she must be obeyed. The imperative of obedience does not change even if the usurper of power is a child or woman.[838] The only relevant consideration is whether the ruler is able to establish order and stability. If order and stability exists then rebellion is by necessity forbidden.[839] Whether the ruler is substantively just or unjust is largely irrelevant; rebellion in all circumstances remains illegal.[840] Jurists from this trend concede that early on in Islamic history, notables such as al-Ḥusayn and Ibn al-Zubayr rebelled against unjust rulers. Of course, these early rebellions pose a serious theological problem for the traditional trend because the jurists do not wish to argue that the likes of al-

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[838] Ibn Ḥajar al-Haytamī (Shāfi'ī, d. 974/1566-7) *Fatḥ al-Jawwād Sharḥ al-'Irshād* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1971), vol. 2, 295; Abū Yaḥyā Zakariyyā al-Anṣārī (Shāfi'ī, d. 926/1520), *Fatḥ al-Wahhāb bi Sharḥ Minhāj al-Ṭullāb* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1948), 155.

[839] Ibn Qudāma (Ḥanbalī, d. 620/1223-4), *al-Mughnī*, vol. 10, 48; Idem, *al-Kāfi*, vol. 4, 146, cites the precedent of 'Abd al-Malik b. Marwān in support of the argument that a usurper becomes legitimately entitled to power. Al-Zarkashī (Ḥanbalī, d. 772/1370), *Sharḥ*, vol. 6, 216-7, cites the same precedent arguing that 'Abd al-Malik b. Marwān rebelled against Ibn al-Zubayr and defeated him. Yet, 'Abd al-Malik b. Marwān became the legitimate ruler. See also al-Bahūtī (Ḥanbalī, d. 1051/1641), *Kashshāf*, vol. 6, 158, 160; 'Alā' al-Dīn Abū al-Ḥasan 'Alī b. Sulaymān al-Mazdāwī (Ḥanbalī, d. 885/1480-1) *al-'Inṣāf fī Ma'rifat al-Rājiḥ min al-Khilāf* (Beirut: Dār 'Iḥyā' al-Turāth al-'Arabī, n.d.), vol. 10, 310-11.

[840] Ibn Mufliḥ (Ḥanbalī, d. 763/1361), *al-Furū'*, vol. 6, 159-60, notes that two Ḥanbalī jurists, Ibn al-Jawzī and Ibn 'Aqīl, permitted rebellion against an unjust ruler. The author, however, rejects this position and argues that rebellion is never permitted, and that impatience and ignorance are the causes of all rebellions. Ibn al-Muqrī (Shāfi'ī, d. 837/1433), *al-'Irshād*, printed with Ibn Ḥajar al-Haytamī, *Fatḥ al-Jawwād Sharḥ al-'Irshād*, vol. 2, 295. Ibn Ḥajar (Shāfi'ī, d. 974/1566-7) adds that the doors of sedition must be closed. Therefore, regardless of the degree of *'ijtihād* or knowledge a rebel may reach, rebellion is never justified, Ibid., at vol. 2, 294. Al-Qasṭalānī (d. 923/1517), *'Irshād*, vol. 10, 170, 220, argues that rebellion is not permitted as long as the ruler's commands or behavior is defensible under any possible interpretation. See also Muḥammad b. 'Alī b. Muḥan al-Ḥubayshī (d. 1283/1866), *Fatḥ al-Mannān Sharḥ Zubad Ibn Raslān* (Beirut: Mu'assasat al-Kutub al-Thaqāfiyya, 1988), 406-7. Muḥammad al-Zuhrī al-Ghamrāwī, *'Anwār al-Masālik Sharḥ 'Umdat al-Sālik wa 'Uddat al-Nāsik* (Cairo: Sharikat Maktabat wa Maṭba'at Muṣṭafā al-Bābī al-Ḥalabī, 1948), 253. 'Aḥmad b. al-Naqīb al-Maṣrī b. Lu'lu'a (Shāfi'ī, d. 769/1367), *'Umdat al-Sālik*, printed in al-Makkī, *Fayḍ*, vol. 2, 302. Al-'Ālūsī (Ḥanafī, d. 1270/1853), *Ruḥ*, vol. 26, 151, adds that a rebel commits a grave sin if he rebels without a *ta'wīl* or with a *ta'wīl* that is clearly false. Al-Qurṭubī (Mālikī, d. 671/1273), who does not belong to the traditional trend, claims that *'Ahl al-Ḥadīth* was the only group to outlaw rebellion in all circumstances, al-Qurṭubī, *al-Jāmi'*, vol. 6, 157. Ibn 'Ābidīn (Ḥanafī, d. 1252/1836-7), *Ḥāshiya*, vol. 6, 411. The author belongs to the revisionist trend. He argues, however, that rebellion is prohibited because in his day and age, all those who compete over power are motivated by greed, and thus, it has become impossible to distinguish the just from the unjust.

Ḥusayn committed a wrongful act. However, they resolve the theological challenge by distinguishing such precedents. For the most part, these jurists argue that in early Islam, rebellion was, in fact, permitted, nevertheless, a subsequent late *'ijmā'* (consensus) was reached forbidding all rebellions regardless of the reason. Therefore, while it was permissible for al-Ḥusayn to rebel against Yazīd, this precedent is no longer effective or persuasive.[841] Hence, after the reported consensus was reached, even if the rebels have just cause or even if the specific interpretation adopted by the rebels is religiously correct, rebellion remains forbidden. The traditional trend goes further and argues that, as a legal matter, the ruler is always right (*muḥiqq*) and the rebels are always wrong.[842] A ruler is conclusively presumed to be right, and no inquiry should be made in the qualitative nature of the rebels' interpretations or claims. While these jurists often reiterate the maxim that no ruler should be obeyed if he commands a sin, nevertheless, they also argue that a sinful order should be passively resisted without a resort to arms.[843]

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[841] Al-Jamal (Shāfi'ī), *Ḥāshiya*, vol. 5, 114; Ibn al-Muqrī, *al-'Irshād*, vol. 2, 295; Ibn Lu'lu'a, *'Umda*, printed in al-Makkī, *Fayḍ*, vol. 2, 302; al-'Ābī (d. 828/1424), the author, does not necessarily belong to the traditional trend. However, he reports on the various opinions regarding this debate. Part of the debate is whether the people of Medina rebelled against al-Ḥajjāj because he was iniquitous (*fāsiq*) or an unbeliever (*kāfir*), al-'Ābī, *Sharḥ*, vol. 6, 529, 554, 564. If people rebelled because al-Ḥajjāj was iniquitous, that could mean that rebellion is permitted against any iniquitous ruler. If, however, al-Ḥajjāj was an unbeliever, that could mean that rebellion is permitted only if the ruler effectively becomes a *kāfir* (unbeliever). Most jurists from the traditional trend argue that this debate had become irrelevant after the reported consensus prohibiting rebellion was reached. Ibn Mufliḥ, *al-Furū'*, vol. 6, 160-161, states that some ignorant Sunnīs went as far as claiming that al-Ḥajjāj was right and al-Ḥusayn was wrong. The author contends that such people make this claim because they seek to antagonize the Shī'a. The author, however, rejects their argument and asserts that al-Ḥusayn was clearly justified in rebelling against al-Ḥajjāj. Nonetheless, al-Ḥusayn's precedent can no longer justify rebellion.

[842] Ibn Qudāma, *al-Kāfī*, vol. 4, 154; Ibn Mufliḥ (Ḥanbalī, 884/1479), *al-Mubdi'*, vol. 9, 159, states that it is irrelevant whether the interpretation adopted by the rebels is right or erroneous; al-Zarkashī, *Sharḥ*, vol. 6, 222-5, makes the same point. See, also, al-Bahūtī, *Kashshāf*, vol. 6, 161; Ibn Qāsim al-Najdī (Ḥanbalī, d. 1392/1972-3), *Ḥāshiya*, vol. 7, 390, 397. See, also, al-Shirbīnī (Shāfi'ī, d. 972/1569-70), *Mughnī*, vol. 4, 123.

[843] Muḥammad b. 'Alī b. Muḥammad al-Shawkānī (Zaydī, d. 1250/1834) *Kitāb al-Sayl al-Jarrār 'alā Ḥadā'iq al-'Azhār*, ed. Maḥmūd Ibrahīm Zāyid (Beirut: Dār al-Kitāb al-'Ilmiyya, 1985), vol. 4, 509, 556. Al-Shawkānī, *Nayl*, vol. 7, 174. Although the author is not a Sunnī, he could be considered part of the traditional trend. Although he was outwardly Zaydī, al-Shawkānī was actually Wahhābī and Shāfi'ī. Al-Shawkānī insists that in the vast majority of situations, rebellion is not permitted. At one point, he argues that as long as an unjust ruler permits Muslims to pray, rebellion is prohibited. At another point, he argues that as long as the ruler's commands are not clearly violative of the fundamental principles of religion, rebellion is not permitted, Ibid., vol. 7, 171-175. Nonetheless, rather inconsistently, he also

Several jurists, especially Shāfi'ī and Ḥanafī, from the traditional trend continued to repeat the formula that: *baghy* is an act of rebellion against the just (*'ādil*) ruler. However, this formulaic language did not connote a substantive difference. Typically, after repeating the above-mentioned phrase, these jurists would go on to state that rebellion is prohibited in all or most circumstances. Effectively, the word *'ādil* (just) was used as the equivalent of the term *'adl* or rightful. As discussed above, a ruler is rightful whether he or she came to power through usurpation (*bi al-taghallub*) and whether he or she is just or unjust. The Shāfi'ī jurist al-Shirbīnī (d. 972/1569-70) makes this point abundantly clear. He argues that the rebels are to be considered *bughā* even if they are just, and the ruler is unjust. He notes that while some jurists state that the *bughā* are those who rebel against the *'ādil* (just), these jurists mean to say the rightful ruler (*'adl*). Therefore, both expressions, *'ādil* and *'adl*, mean the rightful ruler, and not the just ruler.[844] Many jurists from the traditional trend omit the words "just" or "rightful" altogether, and simply define *baghy* as an act of rebellion against the ruler or the established ruler (*'imām muṭā'* or *man thabatat 'imāmatuhu*).[845]

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argues that unjust rulers may be removed if the attempt to remove them would not lead to *fitna* or injustice. Al-Shawkānī is careful to point out that al-Ḥusayn and other 'Alids did not commit a wrong by becoming involved in rebellions in early Islam. He, however, argues that their precedent is not applicable to later ages because the early 'Alid rebels were more knowledgeable in religion than anyone who might have come after them, Ibid., vol. 7, 176. Al-Shawkānī was a judge in Sana'ā', Yemen, see al-Ziriklī, *al-'A'lām*, vol. 6, 298. He is clearly conflicted on the issue of rebellion. On the one hand, he demonstrates a clear preference for order and stability regardless of the perceived injustice. On the other hand, he is unable to logically and systematically distinguish the early precedents set by 'Alid rebels.

[844] Al-Shirbīnī, *Mughnī*, vol. 4, 123. For reasons explained below, al-Shirbīnī, himself, should be categorized under the revisionist and not the traditional trend. His linguistic assertion that *'ādil* and *'adl*, in this context, mean the same thing is true as far as the traditional and revisionist trend is concerned. Al-Ḥiṣnī (Shāfi'ī, d. 808/1405), *Kifāya*, 492, uses the term *al-'adl*; al-Kāsānī (Ḥanafī, d. 587/1191), *Badā'i'*, vol. 7, 140, uses the expression *'imām ahl al-'adl*. Al-Marghīnānī (Ḥanafī, d. 593/1196-7), *al-Hidāya*, vol. 2, 170, uses the expressions *al-'imām* and *al-'imām al-ḥaqq* (the rightful ruler) interchangeably. Ibn al-Muqri', *al-'Irshād*, vol. 2, 295, uses the word *'imām* but explains that it means *'imām ahl al-'adl*. Ibn 'Ābidīn, *Ḥāshiya*, vol. 6, 411, uses the expression *al-'imām al-ḥaqq* and *al-'imām al-'ādil* interchangeably. He explains that both expressions mean whichever ruler has been able to seize power and establish order. Ibn Mufliḥ, *al-Mubdi'*, vol. 9, 159, uses *al-'imām* and *al-'imām al-'ādil* interchangeably.

[845] Ibn Qudāma, *al-Mughnī*, vol. 10, 48, 52; Idem, *al-Kāfī*, vol. 4, 146; al-Mazdāwī, *al-'Inṣāf*, vol. 10, 310; al-Zarkashī, *Sharḥ*, vol. 6, 215, 217. Among the jurists that state *'imām* without any qualifiers are the following: 'Aḥmad b. al-Ḥusayn b. 'Aḥmad al-'Iṣfahānī al-Qāḍī Abū Shujā' (Shāfi'ī, d. 593/1196-7), *Matn al-Ghāya wa al-Taqrīb*, ed. Mājid al-Ḥamawī (Beirut: Dār Ibn Ḥazm, 1994), 306-7; al-'Anṣārī,

Despite the heavy emphasis on the prohibition against rebellion, the traditional trend does not criminalize the act of rebellion. Rather, the traditional trend often repeats that *baghy* is not a term that connotes blame (*laysa 'ismi dhamm*).[846] The rebels must enjoy both a *shawka* and a *ta'wīl*; the *shawka* is simply a damage control principle. If the *shawka* was not required, the jurists argued, individuals would invent a *ta'wīl* in order to escape from liability for their acts.[847] But it is the existence of a plausible interpretation which substantively distinguishes between rebels and bandits. In fact, several jurists from the traditional trend argue that the reports attributed to the Prophet condemning all rebels as impious or sinners must be understood to apply only to those who rebel without a plausible interpretation. These traditions, they argue, were not intended to condemn rebels who rely on a plausible interpretation or cause.[848] Because the rebels rely on a plausible interpretation or cause, they are to be considered similar to jurists who disagree on particular points of law (*ka'l fuqahā' al-mujtahidīn fī al-furū'*). Hence, the Ḥanbalī Ibn Qudāma (d. 620/1223-4) states: "The *bughā* ...are not dissolute (*laysū bi fāsiqīn*), but

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al-Manhaj, printed with al-Jamal, *Ḥāshiya*, vol. 5, 113-4; Abū Sa'īd 'Abd Allāh b. 'Umar al-Bayḍāwī al-Shīrāzī (Shāfi'ī, d. 685/1286), *al-Ghāya al-Quṣwā fī Dirāyat al-Fatwā*, ed. 'Alī Muḥyī al-Dīn al-Qasrī (Iraq, n.d.), vol. 2, 919; Muḥammad Abū al-Barakāt (Ḥanbalī, d. 652/1254), *al-Muḥarrar fī al-Fiqh*, printed in the margin of Shams al-Dīn Abū 'Abd Allāh Muḥammad Ibn Mufliḥ (Ḥanbalī, d. 763/1361), *al-Nukat wa al-Fawā'id al-Saniyya*, ed. Muḥammad Ḥāmid al-Fiqī (Beirut: Dār al-Kitāb al-'Arabī, n.d.), vol. 2, 166; Bahā' al-Dīn 'Abd al-Raḥmān b. Ibrāhīm al-Maqdisī (Ḥanbalī, d. 624/1226), *al-'Udda Sharḥ al-'Umda* (Beirut: n.p., n.d.), 575, 578; Manṣūr b. Yūnis b. 'Idrīs al-Bahūtī (Ḥanbalī, d. 968/1560), *al-Rawḍ al-Murbi' Sharḥ Zād al-Mustanqi'*, ed. Muḥammad 'Abd al-Raḥmān 'Awaḍ (Beirut: Dār al-Kitāb al-'Arabī, 1986), 517; Mar'ī b. Yūsuf al-Karamī al-Maqdisī (Ḥanbalī, d. 1033/1623), *Dalīl al-Ṭālib* (Damascus: al-Maktab al-Islāmī, n.d.), 275; Ibn Mufliḥ, *al-Furū'*, vol. 6, 152.

[846] Al-Ramlī, *Nihāya*, vol. 7, 402; al-Jamal, *Ḥāshiya*, vol. 5, 113; al-'Ayīnī, *'Umda*, vol. 24, 90. Al-Ḥubayshī, *Fatḥ*, 406, adopts the unusual position that the notion that *baghy* is a term not connoting blame only applies to the early generations of Islam. He implies that those who rebelled after the early generations are in fact iniquitous or sinners. Interestingly, however, his particular rulings on the treatment of rebels are not different from the rulings of the jurists with whom he disagrees.

[847] Al-Bahūtī, *Kashshāf*, vol. 6, 161, adds that if the rebels are around ten individuals they lack a *shawka* and should be treated as bandits. Ibn Qudāma, *al-Mughnī*, vol. 10, 49, states the same. See, also, Ibn Mufliḥ, *al-Mubdi'*, vol. 9, 159. Ibn Qāsim al-Najdī, *Ḥāshiya*, vol. 7, 391, asserts that two, three or ten individuals are to be treated as bandits. Al-Zarkashī, *Sharḥ*, vol. 6, 217-8, notes that if the rebels lack a plausible interpretation, they are to be treated as bandits. He also notes that there is disagreement on the status of rebels who have a plausible interpretation but lack a *shawka*. See, also, al-Mazdāwī, *al-'Inṣāf*, vol. 10, 311-2; Ibn Qudāma, *al-Kāfī*, vol. 4, 146.

[848] Al-Makkī, *Fayḍ*, vol. 2, 303; al-Jamal, *Ḥāshiya*, vol. 5, 113; Ibn Ḥajar al-'Asqalānī, *Fatḥ al-Bārī*, vol. 14, 530. This specific point is often repeated by jurists from the revisionist trend.

they are wrong in their interpretations, and the ruler and the loyalists (*al-'imām wa 'ahl al-'adl*) are right in resisting them. All of them [the ruler and the rebels] are like jurists who disagree on specific points of law."[849] Importantly, however, the rebels, themselves, do not need to be jurists or of an equal degree of learning or knowledge.[850] Furthermore, the rebels do not need to rely on a specifically religious interpretation. In other words, the term *ta'wīl* does not necessarily mean a religious interpretation on a particular point of law. Rather, a *ta'wīl* could either be a disagreement on a legal point or simply a grievance (*maẓlama*). Therefore, a refusal to obey a command which the rebels believe to be illegal or unjust qualifies as a proper *ta'wīl*. If the ruler commands the rebels to pay taxes which they believe to be illegal, this qualifies as a recognizable *ta'wīl* as well.[851] Therefore, the ruler should warn the rebels before fighting them, and if they mention a grievance, the ruler should address it.[852]

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[849] Ibn Qudāma, *al-Mughnī*, vol. 10, 67, 70. See, also, Abū al-Barakāt, *al-Muḥarrar*, vol. 2, 166; al-Makkī, *Fayḍ*, vol. 2, 302, 303; al-Maqdisī, *al-'Udda*, 578; al-Zarkashī, *Sharḥ*, vol. 6, 230-1; Ibn Mufliḥ, *al-Mubdi'*, vol. 9, 165; al-Bahūtī, *Kashshāf*, vol. 6, 165, 166; Ibn Qāsim al-Najdī, *Sharḥ*, vol. 7, 396. Ibn Mufliḥ, *al-Furū'*, vol. 6, 157, mentions that some Ḥanbalī jurists considered the *bughā* sinners, but he refutes this position. Shams al-Dīn Abū 'Abd Allāh Muḥammad b. Abī Bakr b. Qayyim al-Jawziyya (Ḥanbalī, d. 751/1350), *'Aḥkām 'Ahl al-Dhimma*, ed. Ṣubḥī Ṣāliḥ (Beirut: Dār al-'Ilm l'l-Malāyyīn, 1983), vol. 2, 469-70, asserts that if the rebels sincerely believe that they are not committing a sin, they cannot be held liable. Therefore, he implies that the lack of a criminal motive is the primary justification for demanding the existence of a *ta'wīl*. Al-Jamal, *Ḥāshiya*, vol. 5, 114, 115, a Shāfi'ī, argues that some rebels might incur a sin in the Hereafter because of the nature of the belief system they may adopt. But on this earth they are not to be treated as sinners. Al-Ghamrāwī, *'Anwār*, 253-4, states that rebels are not sinners. Al-Wazīr, *al-'Awāṣim*, vol. 8, 14, claims that most Sunnīs did not consider rebellion against unjust rulers forbidden or sinful. See also, Ibn Ḥajar al-'Asqalānī, *Fatḥ al-Bārī*, vol. 14, 312.

[850] Al-Ramlī, *Nihāya*, vol. 7, 402.

[851] Ḥanbalī sources imply that in some circumstances a *ta'wīl* might not be necessary. These sources assert that if two groups fight for tribal reasons or over power, both groups are liable to each other for life and property destroyed. However, if one of these groups is fighting pursuant to the commands of the ruler or is fighting to protect the ruler, then, by definition, this group is considered righteous and correct. The other group is treated as *bughā*. Ibn Qudāma, *al-Mughnī*, vol. 10, 72-3; Idem, *al-Kāfī*, vol. 4, 154. Ibn Qayyim, *'Aḥkām*, vol. 2, 470, asserts that those who fight over tribal reasons are not to be treated as rebels because they are not fighting over something that can constitute a legitimate claim of right. See, also, Abū al-Barakāt, *al-Muḥarrar*, vol. 2, 167; al-Bahūtī, *al-Rayḍ*, 518; Idem, *Kashshāf*, vol. 6, 167; Ibn Mufliḥ, *al-Furū'*, vol. 6, 163; Idem, *al-Mubdi'*, vol. 9, 170; al-Mazdāwī, *al-'Inṣāf*, vol. 10, 325.

[852] Al-Makkī, *Fayḍ*, vol. 2, 302, argues that if the rebels attempt to overthrow the ruler or refuse to obey a law which implicates the rights of God or the rights of the people, and which involves criminal or civil liabilities while relying on a plausible justification, this will count as a recognizable *ta'wīl*. Al-Ḥiṣnī al-

Having accepted this basic premise of the discourse on rebellion, the traditional trend goes on to assert that the point in fighting the rebels is to repel their danger and not to destroy them. Furthermore, their legal acts including testimony in court, and adjudications may be accepted or ratified.[853] Essentially, all the basic components of the discourse of rebellion are repeated without material revision or development. The fugitive, wounded or captive may not be dispatched;[854] unless for dire necessity, weapons of mass destruction may not be used against rebels; rebel property may not be confiscated; rebels must be released after the fighting ends;[855] rebels are not to be held liable for life or property destroyed in the course of their rebellion;[856] funeral prayers may be performed on dead

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Dimashqī, *Kifāya*, 492, argues that the *bughā* are those who refuse to obey the law or refuse to recognize a right belonging to God or to human beings while relying on a plausible justification. Al-Jamal, *Ḥāshiya*, vol. 5, 114, mentions a list of acts that qualify as acts of rebellion. The list includes an attempt to overthrow the ruler or a refusal to pay taxes. The interpretation that the rebels rely on must be such that the rebels sincerely believe that their mutiny is justified. Ibn Qudāma, *al-Mughnī*, vol. 10, 52, states that the *bughā* are those who refuse to obey the ruler or attempt to overthrow him while relying on a plausible justification. Al-Maqdisī, *al-'Udda*, 575, 578, states that the *bughā* are those who rebel seeking to overthrow the ruler while relying on a plausible interpretation. Ibn Mufliḥ, *al-Furū'*, vol. 6, 152, reports that some jurists argued that the *bughā* must seek to seize power or seek to give power to a person other than the ruler or else they are to be treated as common criminals. Al-Marghīnānī (Ḥanafī, d. 593/1196-7), *al-Hidāya*, vol. 2, 170, 172, states that the *bughā* are those who disobey the ruler and rebel in certain territory while enjoying a plausible interpretation. He also argues that a wrong interpretation is considered the equivalent of a right interpretation if the rebels have a *shawka*. This could be read to mean that if the rebels have a considerable number of followers no inquiry will be made in the correctness of their interpretation.

[853] Al-Ḥubayshī, *Fatḥ*, 407. Ibn Qudāma, *al-Mughnī*, vol. 10, 69, adds that rebels may control a specific territory for years and that to refuse to recognize their legal acts would create undue hardship on the residents of the territory. See, also, Ibn Mufliḥ, *al-Mubdi'*, vol. 9, 165. Ḥanafī jurists continued to argue that the ruler does not have legal jurisdiction over the rebel camp. In fact, al-Kāsānī, *Badā'i'*, vol. 7, 141, argues that from the point of view of jurisdiction, the camp of the rebels and the abode of non-believers are equals. However, al-Marghīnānī (Ḥanafī, d. 593/1196-7), *al-Hidāya*, vol. 2, 171, argues that although the ruler does not have jurisdiction over acts committed in the rebels' camp, the ruler does have jurisdiction over acts committed in territory conquered by rebels.

[854] Al-Bayḍāwī, *al-Ghāya*, vol. 2, 920, states that the fugitive and captive may not be pursued even if it is feared that the rebels will re-group.

[855] Ibn Qudāma, *al-Mughnī*, vol. 10, 64, reports that there is some disagreement on if the rebels refuse to exchange prisoners of war whether the loyalists may continue to detain captive rebels. Al-Bahūtī, *al-Kashshāf*, vol. 6, 164-5, argues that if the ruler fears that the rebels will re-group in the *immediate* future, the ruler may continue to detain the rebels until this danger subsides. But al-Mardāwī, *al-'Inṣāf*, vol. 10, 315, notes that there is disagreement on this point. See, also, Ibn Mufliḥ, *al-Mubdi'*, vol. 9, 163. See, also, al-Ḥubayshī, *Fatḥ*, 408.

[856] Ibn Qudāma, *al-Mughnī*, vol. 10, 61; Ibn Mufliḥ, *al-Mubdi'*, vol. 9, 164-5. Al-Mardāwī, *al-'Inṣāf*, vol. 10, 316-7, adopts the unusual position that the rebels should be exempt from financial liability but not

rebels and the corpses of rebels may not be mutilated. Ḥanafī jurists continued to argue that rebels who have a *fi'a* may be pursued and dispatched, and insisted that funeral prayers should not be performed on dead rebels.[857] Most Shāfi'ī and Ḥanbalī jurists continued to respond by arguing that the ruler may not seek the assistance of non-Muslims or Ḥanafīs in fighting rebels unless the ruler is able to restrain them from pursuing or dispatching rebels.[858] Some jurists argued that if a loyalist kills a rebel before or after the rebellion, or kills a fugitive, wounded or captive rebel, the loyalist must be held liable for his transgression.[859]

It is difficult to assess the extent to which the traditional trend was ideologically committed to the doctrines pertaining to the treatment of rebels. In other words, it is difficult to evaluate to what extent this trend repeated these doctrines out of fidelity to precedent and the imperatives of legal culture, and to what extent it promoted this discourse as a means to achieving a moral or social agenda. As noted above, the traditional trend placed a heavy emphasis on the need to obey the ruler, and on condemning rebellion under

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from criminal liability. Abū al-Qāsim Maḥmūd b. 'Umar al-Zamakhsharī (Ḥanafī, 538/1143), *Ru'ūs al-Masā'il*, ed. 'Abd Allāh Nazīr 'Aḥmad (Beirut: Dār al-Bashā'ir al-Islāmiyya, n.d.), 479, misrepresents the Shāfi'ī position by arguing that the Ḥanafīs exempt the rebels from liability but the Shāfi'īs do not. Of course, this could be a copyist's error, but from the context of the text I think it is unlikely. Ḥanafī jurists belonging to the traditional trend continued to argue that although the rebels are not liable for life and property destroyed on this earth, they will be held liable in the Hereafter, al-Marghinānī, *al-Hidāya*, vol. 2, 172.

Interestingly, some jurists, most notably Shāfi'īs, from the traditional trend argued that neither the loyalists nor the rebels should be held liable for life or property destroyed if what was destroyed was reasonably related to the rebellion. In all probability, this is a means/ends test – the means pursued must be related to the ends. Life and property destroyed by loyalists and rebels must be incidental or necessary to the rebellion. This position becomes common in the revisionist trend. See al-Makkī, *Fayḍ*, vol. 2, 303. Al-Ḥubayshī, *Fatḥ*, 408; al-Jamal, *Ḥāshiya*, vol. 5, 116, adds that what the rebels did can neither be described as *ḥalāl* or *ḥarām* but simply as a mistake that should be forgiven.

[857] Al-Kāsānī, *Badā'i'*, vol. 7, 140-1, 142. See the discussion on this issue in al-Shawkānī, *Nayl*, vol. 7, 170; Idem, *al-Sayl*, vol. 4, 558.

[858] Ibn Qudāma, *al-Mughnī*, vol. 10, 53-57, 61, 63-66; Al-Ḥiṣnī al-Dimashqī, *Kifāya*, 492-3. However, al-Makkī, a Shāfi'ī, *Fayḍ*, vol. 2, 303, adopts the Ḥanafī position on the existence of a *fi'a*.

[859] Ibn Qudāma, *al-Kāfī*, vol. 4, 150; Idem, *al-Mughnī*, vol. 10, 60, 64, also notes that 'Alī paid from the public treasury the blood money of rebels killed while retreating. See, also, al-Maqdisī, *al-'Udda*, 576-7; Ibn Mufliḥ, *al-Mubdi'*, vol. 9, 162, 165; al-Bahūtī, *al-Kashshāf*, vol. 6, 164. Al-Zarkashī, *Sharḥ*, vol. 6, 225, implies that if the loyalists exceed the limits of lawful conduct in dealing with the rebels, they are to be held liable on this earth and in the Hereafter.

all circumstances. This trend was not willing to entertain the possibility that, under exceptional circumstances, it might be lawful to rebel or that the ruler might become illegitimate. Although the traditional trend's insistence on preserving the classical doctrines on rebellion cannot be dismissed as simply the product of legal formalism,[860] the fact that there was no serious attempt to amend or change the doctrines on rebellion points to an unmistakable degree of ambivalence about this field of the law. It is quite probable that the jurists of the traditional trend repeated the rules pertaining to the treatment of rebels without an ideological commitment to this area of the law. In other words, it is doubtful that they were citing these rules as a way to criticize the conduct of the state in dealing with rebels or to morally empower rebels against the state. In fact, some jurists, particularly from the Ḥanbalī school, adopted the early Mālikī position that sectarians such as the Murji'a, Qadariyya and Shī'ites should be asked to repent or be killed not for their *baghy* but for causing corruption on the earth. In effect, these jurists circumvented the restrictions of the doctrines of rebellion by arguing that if sectarian groups (*'ahl al-'ahwā'* or *'ahl al-bida'*) rebel initially, they are to be treated as rebels entitled to the protections of *'aḥkām al-bughā*. However, ultimately they may be killed for causing corruption on the earth, and not for the act of rebellion.[861] All of this points to a certain lack of commitment to the discourses pertaining to the treatment of rebels by jurists from the traditional trend. The authoritativeness of the doctrines of rebellion is compromised by adopting the ambiguities associated with the early Mālikī debates on this issue. The question then remains: Why did the jurists of the traditional trend continue to re-assert the rules of conduct pertaining to the treatment of rebels who have a *ta'wīl* and *shawka*?

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[860] One option was to simply omit the discourse on the treatment of rebels. The Shāfi'ī jurist al-Sayyid al-Bakrī, *'I'ānat al-Ṭālibīn* (Beirut: Dār 'Iḥyā' al-Turāth al-'Arabī, n.d.), 166-7, did just that. He addresses the laws of banditry but omits the discussion on rebellion. See, also, 'Abd al-Ghanī b. 'Abd al-Wāḥid al-Maqdisī al-Jamā'īlī (d. 600/1203) *al-'Umda fī al-'Aḥkām fī Ma'ālim al-Ḥalāl wa al-Ḥarām*, ed. Muṣṭafā 'Abd al-Qādir 'Aṭā' (Beirut: Dār al-Kutub al-'Ilmiyya, 1986).

[861] Ibn Mufliḥ, *al-Mubdi'*, vol. 9, 160, 169; Mardāwī, *al-'Inṣāf*, vol. 10, 322-4, reports on various positions and argues that the Shī'ites are worse than the Khawārij, and that they should be killed. See the discussion on this matter in Ibn Qudāma, *al-Mughnī*, vol. 10, 58-60, 67, who does not support the idea that the sectarians should be asked to repent or be killed, but he does argue that sectarians are *fasaqa* and that their testimony should not be accepted in court and funeral prayers should not be performed over their dead.

There is no question that part of the answer is that the discourses on rebellion had become firmly rooted in Islamic legal culture, and it would have been quite radical to ignore the inherited doctrines. But one can get a sense of the additional issues that preoccupied the jurists by examining new points of emphasis and focus in the text. It is the points of emphasis or re-emphasis, and the points which are not repeated according to inherited formulaic language which provide the best insight into the social and political concerns of the jurists. We have already noted that jurists from the traditional trend focused on the need for order and stability, and it is clear that this issue was one of their primary concerns. The other issue that preoccupied the jurists from the traditional trend is the distinction between rebels and bandits, and whether the various sects of the Khawārij should be treated as rebels. We have already noted that many of the Khawārij, Qarāmiṭa and Bāṭiniyya sects pursued means similar in nature to the means pursued by bandits.[862] They targeted civilians and moving caravans, and adopted non-conventional means of warfare. Furthermore, the Khawārij, Qarāmiṭa, Bāṭiniyya and similar groups spread terror by pursuing a policy of stealth attacks (*qatl al-ghīla*) and indiscriminate slaughter. This issue became particularly important after the Mongol invasion because of the indiscriminate slaughter committed by the Mongols, and because the Mongols ultimately converted to Islam. Hence, those committing the slaughter were formally Muslims.[863] Furthermore, perhaps the Mongols desired to achieve certain political objectives, but, unlike the Khawārij or Bāṭiniyya, they were not theologically motivated.

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[862] Ibn Ḥajar al-'Asqalānī, *Fatḥ al-Bārī*, vol. 14, 306; al-'Ābī, *Sharḥ*, vol. 6, 556; Ibn Taymiyya, *Majmū'*, vol. 35, 13.

[863] This is clearly so in the case of Tamerlane who became a Muslim and continued to slaughter. Furthermore, Ibn Taymiyya and others speak of Mongol converts to Islam who continue to pillage and plunder.

The jurists of the traditional trend discuss whether rebels who do not rely on a plausible interpretation or cause should be treated as bandits or whether they should be simply held liable for life and property destroyed.[864] The distinction is significant because bandits are either executed, crucified, amputated from opposite ends or banished. Furthermore, bandits may not be forgiven for their transgressions unless they repent and surrender before they are captured, and even then, the victims of banditry have the right to demand exaction. Rebels who do not qualify for the protections afforded by the status of *baghy*, but who also are not considered bandits, are treated as common criminals not subject to the particularly harsh penalties of banditry. In other words, even if a group does not qualify to be treated as *bughā*, there is a serious substantive difference in whether the group is given the status of common criminals or bandits. The question then becomes: if the jurists refuse to recognize the plausibility of a group's interpretation or cause, what is the status of such a group?

Jurists from the traditional trend focus much of their discussion on whether groups such as the Khawārij have a recognizable, plausible interpretation or not. Furthermore, if the group is declared *not* to have a plausible interpretation, what is the group's proper legal status? The material legal elements in the crime of banditry are the spread of terror (*al-'ikhāfa or al-'ir'āb*), and that bandits render their victims helpless (*'adam luḥūq al-*

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[864] Ibn Qudāma, *al-Mughnī*, vol. 10, 49; Idem, *al-Kāfī*, vol. 4, 146, states that if the rebels lack either a plausible interpretation or a degree of strength, they are bandits; al-Bahūtī, *al-Rawḍ*, 517, states the same; al-Maqdisī, *Dalīl al-Ṭālib*, 275, states the same; Ibn Mufliḥ, *al-Furū'*, vol. 6, 152, states the same; Ibn Mufliḥ, *al-Mubdi'*, vol. 9, 159, states the same; Al-Bahūtī, *Kashshāf*, vol. 6, 161, states the same; Ibn Qāsim al-Najdī, *Ḥāshiya*, vol. 7, 391, states the same. Al-Zarkashī, *Sharḥ*, vol. 6, 217-8, notes that if the rebels lack a plausible interpretation, they are to be treated as bandits. Al-Mardāwī, *al-'Inṣāf*, vol. 10, 311-2, states that there is disagreement over whether they are to be treated as bandits or common criminals. But he argues that those who lack *shawka* should be treated as bandits. Al-Ḥiṣnī al-Dimashqī, *Kifāya*, 492, asserts that they are not treated as *bughā* but they are not treated as bandits either. Al-Jamal, *Ḥāshiya*, vol. 5, 114-115, argues that those who lack a *ta'wīl* or *shawka* are to be held liable for their acts but are not to be treated as bandits. Those who intend to spread terror are to be treated as bandits. See, also, al-Ḥubayshī, *Fatḥ*, 407, who asserts that rebels should not be treated as bandits even if they lack one of the qualifying conditions for *baghy*. Al-Makkī, *Fayḍ*, vol. 2, 302, argues that those who do not qualify as *bughā* should be treated as common criminals and not bandits. Al-Ghamrāwī, *'Anwār*, 253, asserts the same. Al-Wazīr, *al-'Awāṣim*, vol. 8, 15, argues that Sunnīs considered those who do not have an interpretation to be bandits, and he adds that Yazīd b. Mu'āwiya and his like are the real bandits.

ghawth).[865] Hence, the material legal question is: What is the status of groups such as the Khawārij whose system of thought justifies the terrorizing and victimizing of people when they are most unable to resist? As we saw earlier, the Mālikī school had dealt with this specific issue and, as we will discuss below, continued to develop it further. The traditional trend, particularly among Ḥanbalī jurists, gravitated towards the Mālikī discourses on this point by citing extensively Mālikī views, but did not necessarily end up adopting positions identical to the Mālikī treatment. As noted below, several legal sources written after the 6th/12th century complain about the widespread practice of banditry particularly by what are called the *'A'rāb* (bedouins).[866] The traditional trend, however, does not specifically address the practice of these tribes. Rather, it focuses on whether groups such as the Khawārij should be denied the status of *baghy* despite the fact that such groups might have a plausible interpretation and a degree of strength. Al-Shahrastānī (d. 548/1153) argues that every group that rebelled from the time of the Companions and onwards were simply called the Khawārij.[867] Furthermore, several jurists argue that the Khawārij are *bughā*, and that there is no material distinction between the Khawārij and any other rebellious group.[868] However, many other jurists argued that even if the Khawārij rely on an interpretation, they should not be treated as *bughā*, and, effectively, should be treated as bandits. This means that if the Khawārij destroy life or property it is mandatory that they be held liable for their crimes. The ruler does not have discretion to pardon them, and their captive and fugitive may be dispatched. Yet another group of jurists argued that even if the Khawārij are considered rebels, they should be killed for causing corruption on the earth and not for their rebellion.[869]

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[865] Al-Jamal, *Ḥāshiya*, vol. 5, 152-3; al-Ḥubayshī, *Fatḥ*, vol. 417; al-Zarkashī, *Sharḥ*, vol. 6, 364-5; Ibn Mufliḥ, *al-Furū'*, vol. 6, 140; Idem, *al-Mubdi'*, vol. 9, 146; al-Najdī, *Ḥāshiya*, vol. 7, 377; Ibn Qudāma, *al-Mughnī*, vol. 10, 49-52, 58-60, 62-3; Idem, *al-Kāfī*, vol. 4, 168, 170; al-Bayḍāwī, *al-Ghāya*, vol. 2, 933; al-Ghamrāwī, *'Anwār*, 263; Ibn Qayyim, *'Aḥkām*, vol. 2, 470; al-Makkī, *Fayḍ*, vol. 2, 320, adds that if criminals attack people at home and render them helpless, the criminals are bandits. See al-Zamakhsharī, *Ru'ūs*, 499, who repeats the traditional Ḥanafī position that the crime of banditry cannot be committed in a town because people are not helpless in inhabited areas. Several jurists insisted that bandits must have a pecuniary motive of usurping money from their victims: Abū al-Barakāt, *al-Muḥarrar*, vol. 2, 160, a Ḥanbalī, also adopts the Ḥanafī position that banditry can only be committed in the desert and not in urban centers. Al-Maqdisī, *al-'Udda, 570*. Al-Bahūtī, *al-Rawḍ*, 515, argues that banditry could be committed in the desert, in urban centers and in the sea. See, also, Idem, *Kashshāf*, vol. 6, 150.

[866] Such bandits were often known as *ṣa'ālīk*, *futtāk* or *mansar*, see Kraemer, "Apostates," 63. See, also, Ibn Taymiyya, *al-Siyāsa*, 68; al-Jamal, *Ḥāshiya*, vol. 5, 117, 153; Ramlī, *Nihāyat*, vol. 7, 405, vol. 8, 4; Muḥammad Amīn b. 'Umar al-Dimashqī, Ibn 'Ābidīn (d. 1252/1836-7), *al-'Uqūd al-Durriyya fī Tanqīḥ al-Fatāwā al-Ḥāmidiyya* (Cairo: n.p., 1337 AH), vol. 1, 148.

[867] Al-Shahrastānī, *al-Milal wa al-Niḥal*, vol. 1, 132. See, also, al-Ḥubayshī, *Fatḥ*, vol. 407, who argues that the Khawārij and rebels are the same; al-'Ayinī, *'Umda*, vol. 24, 84, mentions the debate over the status of the Khawārij. Ibn 'Ābidīn, *Radd*, vol. 6, 412. See also, Ibn Ḥajar al-'Asqalānī, *Fatḥ al-Bārī*, vol. 14, 308.

By focusing on the status of the Khawārij, the traditional trend raises a much larger issue, namely, the status of groups who reject the very logic upon which the order of society is established. It is one thing to tolerate groups that rebel out of zeal for their own rights or because they wish to replace the head of state. In both of these situations, these groups accept the basic logic of law and order, and accept the corollary role of the jurists and their position as the spokespeople for the law of God. These groups do not necessarily seek to alter the foundation of law and order upon which juridical authority is established and promoted. However, it is quite another to tolerate groups which challenge the corporate institutions upon which juridical authority relies. Put differently, bandits or similar groups that pursue policies of indiscriminate slaughter also promote anarchy. This is the reason, for example, that the Ḥanbalī jurist, Ibn Mufliḥ (d. 763/1361), argues that even if the Mongols convert to Islam, if the Mongols are fought, their wounded, fugitive and captive may be dispatched, and their property may be confiscated. The conduct of the Mongols at war qualifies them for the status of bandits.[870] Fundamentally, by reiterating and emphasizing the treatment due to legally recognizable rebels, jurists of the traditional trend emphasized the difference between rebels who accept the legitimacy of Sunnī Muslim society but rebel against the political order, and rebels who accept neither the legitimacy of the political order nor the society which it rules.[871] By emphasizing the lenient treatment to be given to rebels, Muslim jurists tacitly condemned groups which pursue indiscriminate slaughter and lawlessness.

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[868] Al-Kāsānī, *Badā'i'*, vol. 7, 140. Al-Wazīr, *al-'Awāṣim*, vol. 4, 369, claims that most Sunnī jurists did not consider the Khawārij infidels.

[869] Ibn Mufliḥ, *al-Mubdi'*, vol. 9, 160-1, 169; al-Zarkashī, *Sharḥ*, vol. 6, 217-8; Ibn Mufliḥ, *al-Furū'*, vol. 6, 152, 161; al-Najdī, *Ḥāshiya*, vol. 7, 394, 396; al-Bahūtī, *Kashshāf*, vol. 6, 161; al-Mazdāwī, *al-'Inṣāf*, vol. 10, 312-3, 323-4; al-Bayḍāwī, *al-Ghāya*, vol. 2, 919; Ibn Qudāma, *al-Kāfī*, vol. 4, 146, 153. Al-Jamal, *Ḥāshiya*, vol. 5, 115, argues that if the Khawārij intend to terrorize the wayfarer, then they should be treated as bandits.

[870] Ibn Mufliḥ, *al-Furū'*, vol. 6, 162-3; Ibn Taymiyya, *al-Siyāsa*, 68, 71, singles out the bedouins, Turkomans, Kurds and Mongol soldiers as groups who commit banditry.

The Mālikī Traditionalists:

Thus far, we have postponed addressing the discourse of the Mālikī jurists on rebellion after the arisal of the traditional trend. As discussed earlier, Mālikī jurists were late-comers to the discourses on rebellion, and it is important to trace separately the development of their discourses on the subject, as a school. Eventually, various Mālikī jurists became part of the different trends -- traditionalist and revisionist. Nonetheless, before this development took place, Mālikī jurisprudence went through a process of transformation after the 5th/11th century through which it accepted the traditional doctrines of *'aḥkām al-bughā*. It is clear that the reason for this transformation is the fact that this field of the law had become universally well-established and Mālikī jurists either needed to develop a systematic reason to reject it, or to transplant it into their own jurisprudential discourse. While some late Mālikī jurists continued to ignore the whole issue of the *bughā*,[872] the majority accepted it as part of the general Muslim legal heritage, and, as such, fully engaged the discourse. Interestingly, while some jurists adopted positions that had become the trademark of the traditional trend, several other Mālikī jurists led the movement to revise the traditional discourses. In other words, while Mālikī jurists around the 6th/12th century were heavily influenced by the inherited doctrines of *'aḥkām al-bughā*, Mālikī jurists around the 9th/15th century, in turn, influenced the revisionist efforts on the subject.

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[871] This is why the discussion on the status of the Khawārij focuses on "*man yastaḥillū dimā' al-muslimīn*" or "*man yukaffirū al-muslimīn*". This is considered the equivalent of causing corruption on the earth.

[872] For instance, Abū Isḥāq Ibrāhīm b. al-Ḥasan b. 'Abd al-Rafī' (d. 733/1332), *Mu'īn al-Ḥukkām 'alā al-Qaḍāyā wa al-Aḥkām*, ed. Muḥammad b. Qāsim b. 'Ayyāḍ (Beirut: Dār al-Gharb al-Islāmī, 1989), vol. 2, 878-9, addresses banditry but does not address rebellion. He argues that whoever terrorizes the wayfarer is a bandit. The author lived during a turbulent era under the Ḥafṣid dynasty in Tunisia (627/1229 - 982-1574). He, himself, apparently supported a rebellion, see Idem, vol. 1, 37. Abū Bakr Muḥammad b. Muḥammad b. 'Āṣim (d. 829/1425), *Tuḥfat al-Ḥukkām* (Cairo: Maṭba'at al-Istiqāma, n.d.), 280, deals extensively with banditry arguing that banditry includes terrorizing the wayfarer, murder by deception or

As discussed earlier, Ibn 'Abd al-Barr had achieved a synthesis between the doctrines of rebellion and banditry in the 5th/11th century. Nonetheless, the discourses on rebellion continued to occupy an ambiguous position among Mālikī jurists in the 6th/12th century. The notable Mālikī jurist and judge, Ibn Rushd I (d. 520/1126), provided the nexus between the inherited Mālikī ambivalence towards this discourse, and the traditional doctrines widely adopted by the other schools of law. He developed the theoretical justification for the eventual adoption of the doctrines of rebellion, but he also systematized and developed the Mālikī doctrines on banditry. Effectively, he laid the foundation for the adoption into Mālikī discourses of a systematic distinction between rebellion and banditry. Importantly, for the most part, Ibn Rushd did not provide the theoretical justification by addressing rebellion directly. Rather, he focused most of his discussion on the conflict between the Companions, and on the rebellion of Mu'āwiya against 'Alī.

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stealth (*ghīla*) and breaking and entering a home and holding the occupants hostage. He comments that in his age, banditry is widespread in the Maghrib, but he does not address rebellion. Abū Isḥāq Ibrāhīm b. 'Alī al-Ya'murī Ibn Farḥūn (d. 799/1396-7), *Durrat al-Ghawwāṣ fī Muḥāḍarat al-Khawāṣ*, ed. Muḥammad Abū al-Jaffān and 'Uthmān Batīkh (Beirut: Mu'assasat al-Risāla, 1985), 173, passingly mentions the *bughā* but deals with banditry in p. 318-9. Al-Nafrāwī (d. 1125/1713), *al-Fawākih*, 217, 222-3, deals extensively with banditry noting that it is widespread in North Africa, and that bandit groups are powerful, and often wreak havoc upon whole territories. Other than commenting that those who fight over political power or out of enmity or rancor are not bandits, he does not deal with rebellion. 'Alī al-Ṣa'īdī al-'Adawī (d. 1189/1775), *Ḥāshiya 'alā Kifāyat al-Ṭālib al-Rabbānī li Risālat Ibn Abī Zayd al-Qayrawānī* (Cairo: Sharikat Maktabat wa Maṭba'at Muṣṭafā al-Bābī al-Ḥalabī, 1938), vol. 2, 249-55, extensively addressing banditry noting that it is widespread among the bedouins of Africa, and that such bandits are capable of raiding and destroying wide areas of territory. He does not address rebellion except to state that if a group refuses to pay taxes while having the means to do so, even if they rely on an interpretation, the ruler may imprison them until they comply, Ibid., 252. Abū al-Ḥasan 'Alī b. 'Abd al-Salām al-Tasūlī (Madīdash) (a judge in Fās, d. 1258/1842), *al-Buhja fī Sharḥ al-Tuḥfa* (Beirut: Dār al- Fikr, n.d.), vol. 2, 347-9, 360-2, 373-4, extensively discusses banditry noting that banditry in Fās is widespread and that bandits are respected and glorified, but does not deal with rebellion. See, also, Muḥammad b. 'Abd al-Bāqī b. Yūsuf al-Zarqānī (d. 1122/1710-11), *Sharḥ al-Zarqānī 'alā Muwaṭṭa' al-Imām Mālik* (Beirut: Dār al-Kutub al-'Ilmiyya, 1990).

Ibn Rushd adopts the traditional Sunnī position that neither 'Alī nor those who rebelled against him were morally or religiously blameworthy. He argues that all sides sincerely believed in the justness of their cause, and therefore, all sides were acting in good faith. Nonetheless, Ibn Rushd argues that this does not mean that all sides were equally correct or that all their claims were of equal moral or religious worth. Rather, he maintains 'Alī was clearly correct and his opponents were clearly wrong, and no discerning Muslim should believe otherwise. It is improper for a Muslim to adopt a position of moral relativism or neutrality and argue that all the competing parties were equally wrong or equally right. Ultimately, 'Alī was the rightful party and the others were mistaken.[873] Nevertheless, Ibn Rushd argues that each of the contending parties was not blameworthy because each of them had acted pursuant to their sincerely-held belief. In the Hereafter, those who were ultimately right will be rewarded twice, and those who were wrong will be rewarded once. Those who were wrong are rewarded for acting upon what they sincerely believed to be the just position.[874] Importantly, he argues that it was imperative upon each and every Companion to act upon his or her own individual belief. Therefore, it is wrong to adopt a position of neutrality (*'i'tizāl*), and, as a matter of principle, to refuse to take a position on the conflict as a whole.[875] Ibn Rushd adds that as a matter of principle one cannot obey a command which entails disobeying God, and that one must act upon what one sincerely believes is the Divine imperative.[876] Significantly, Ibn Rushd is well-aware that there is a certain risk inherent in his argument. The logic of his argument is such that it would support a resort to armed rebellion if one sincerely believes that such is the Divine command, or that one's religious convictions require him to reject an illegal temporal command.[877] Ibn Rushd does not deal systematically with this risk, but simply warns that shedding the blood of fellow Muslims is a grave matter, and if it is taken lightly or dealt with negligently it will result in committing a sin.[878] Therefore, using the example of the Companions, the import of Ibn Rushd's argument is that rebellion is at times justified or even imperative. But shedding the blood of Muslims without sufficient cause or justification is a sin.

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[873] Ibn Rushd I, *al-Bayān*, vol. 16, 360-1, vol. 17, 240-3, 486-8, vol. 18, 175-77. Abū Bakr Muḥammad b. 'Abd Allāh al-'Arabī, the Mālikī jurist, (d. 542/1147), *Kitāb al-Qabas fī Sharḥ Muwaṭṭa' Mālik b. 'Anas* (Beirut: Dār al-Gharb al-Islāmī, 1992), vol. 2, 593, argues that all the contending parties were partly right but 'Alī was closer to being correct than any of the other parties.

[874] Ibn al-'Arabī, *al-'Aḥkām*, vol. 4, 1717-1720, argues that the Companions did not fight over power or worldly affairs. Rather, they fought over a legal dispute. 'Alī believed that he should delay pursuing and prosecuting the murderers of 'Uthmān until he was able to properly establish his power base and order in the empire. The other Companions believed that he should not delay the prosecution of 'Uthmān's murderers because this should have been a point of first priority. Therefore, they disagreed over a proper point of *'ijtihād*, and the various contending parties cannot be considered blameworthy. He, however, maintains that 'Alī was clearly the rightful ruler and that all the other parties were *bughā*. He argues that some of the parties such as the people of Shām refused to give 'Alī their *bay'a* (oath of allegiance) while others such as 'Ahl al-Nahrwān (the Khawārij) sought to overthrow him. All parties opposing 'Alī should have sought conciliation and reform, but when they rose in arms against him, they became *bughā*.

[875] Ibn Rushd I, *al-Bayān*, vol. 16, 360, vol. 18, 175-77, 288. Ibn al-'Arabī, *'Aḥkām*, vol. 4, 1719, seems to agree that a position of neutrality is not acceptable. He apologizes for Companions who failed to support 'Alī by arguing that they mistakenly thought that 'Alī did not need their assistance. He even

Apart from the specific issue of rebellion, Ibn Rushd deals with the status of what he calls *'ahl al-'ahwā'* (sectarian groups) such as the Qadariyya, Murji'a, Mu'tazila, Khawārij and Rāfiḍa. Ibn Rushd is indecisive as to their status; he reports that there is considerable disagreement as to whether they are to be considered infidels or not.[879] He, however, counsels that declaring anyone who outwardly professes the faith to be an infidel is a grave matter, and, therefore, it is safer not to consider them infidels although their

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mentions a report in which Mu'āwiya chides Sa'd b. 'Abī Waqqāṣ for failing to take an active role in the conflict by either reconciling the contending parties or fighting against the unjust party. Sa'd is reported to have expressed his regrets for not fighting the *bughā*. The interesting point, of course, why is Ibn Rushd I citing this report. Does Ibn Rushd I mean to say that Sa'd is expressing his regret for not fighting against Mu'āwiya since Mu'āwiya is considered the *bāghi* or does Ibn Rushd I mean to say that Sa'd is apologizing for not supporting 'Uthmān? The context of Ibn Rushd I's discussion leaves one with the impression that he (Ibn Rushd) means the first.

[876] Ibn Rushd I, *al-Bayān*, vol. 16, 362, vol. 18, 188.

[877] Ibn al-'Arabī makes the nexus between the conflict of the Companions of the Prophet, and the law of rebellion more explicit. He argues that the reason that the Companions fought is so that Muslims would learn the rules of fighting rebels -- that the wounded and fugitive would not be dispatched, women would not be taken captive and rebel money would not be taken as spoils of war. See Ibn al-'Arabī, *Kitāb al-Qabas*, vol. 2, 593-4; Idem, *'Aḥkām*, vol. 4, 1720, 1722, states the same and adds that the Companions established the principle of non-liability for life and property damaged during the fighting.

[878] Ibn Rushd I, *al-Bayān*, vol. 18, 288.

[879] Ibn Rushd I, *al-Bayān*, vol. 18, 486-8.

theology is clearly reprehensible.[880] The implication to Ibn Rushd's argument is that there are limits to the admissibility of subjective individual systems of belief even if they are sincerely and honestly held. But it is not clear from Ibn Rushd's discourse, as well as in Mālikī discourse in general, what distinguishes rebels from sectarians or what are commonly called *'ahl al-'ahwā'*. Importantly, Ibn Rushd argues that sectarians who rebel are to be distinguished from bandits. Rebels who rely on an interpretation or system of conviction (*ta'wīl*) such as *'ahl al-'ahwā'* are not to be treated as bandits.[881]

Ibn Rushd deals extensively with the issue of banditry.[882] He employs a rather broad definition of banditry: whoever spreads terror and corrupts on the earth is a bandit, even if he or she does not usurp money or commit murder.[883] Ibn Rushd's point is that banditry is a crime that relies on terror and the helplessness of its victims to achieve an illegal objective. For instance, while Ibn Rushd served as a judge, he adjudicated a case involving a group which abducted and raped a woman. Ibn Rushd ruled that they were bandits and should be treated as such. Several jurists disagreed and argued that they should not be considered bandits because they did not usurp money or property. However, Ibn Rushd defended his decision by arguing that rape is worse than the destruction of property, and that the crime of rape deserves the harshest possible penalty. People, he argued, will willingly give away their property but not have their wives or daughters raped. Interestingly, Ibn Rushd also engages in a sharply worded criticism of those who did not support his ruling in the case. He accuses these jurists of ignorance and shortsightedness, and warns people from accepting the views of narrow-minded and ignorant judges and *muftīs* (*wa ḥasbukum min balā'i ṣuḥbat al-juhhāl wa khuṣūṣan fī al-futyā wa al-qaḍā'*).[884]

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[880] Ibn Rushd I, *al-Bayān*, vol. 16, 363-5. Ibn Rushd adds that it is reprehensible to sell weapons in Berber territory because this is the territory of *'ahl al-'ahwā'*.

[881] Ibn Rushd I, *al-Muqaddimāt*, vol. 3, 236.

[882] Ibn Rushd I, *al-Bayān*, vol. 16, 416-8; Idem, *al-Muqaddimāt*, vol. 3, 227-236.

[883] Ibn Rushd I, *al-Muqaddimāt*, vol. 3, 227-8. However in Idem, *al-Bayān*, vol. 16, 416, he refers to bandits as robbers.

Although Ibn Rushd's definition of banditry is not precise, it is clear that banditry is not limited to acts of armed robbery, and that an element of the crime is that it results in the spread of terror and insecurity.[885] Therefore, because of the particularly heinous nature of the crime, Ibn Rushd argues that the ruler must enjoy considerable discretion in dealing with bandits. The ruler should be able to choose whether to execute, crucify, amputate from opposite ends or banish bandits. Nonetheless, Ibn Rushd insists that the ruler should not be able to choose the punishment according to his whim, but according to the danger posed by the bandit, and the amount of actual harm the bandit has caused.[886] Ibn Rushd argues, however, that if a bandit committed murder, the bandit must be killed or crucified, and the ruler does not have discretion to choose a more lenient penalty such as amputation or banishment. If the bandit takes money or property, the ruler may not banish him, but must either execute, crucify or amputate him.[887] Ibn Rushd then engages in a fairly lengthy discussion on whether, if the bandit repents and surrenders before being captured, this exempts him from the criminal penalties of banditry, and whether, even if he or she is exempted from such penalties, the victims retain the right to demand vengeance or compensation.[888] Interestingly, in all circumstances, Ibn Rushd argues, the vast majority of jurists held that if a bandit is killed, crucified or executed, he or she must be properly buried as a Muslim, and funeral prayers should be performed.[889]

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[884] The case is reported in Ibn al-'Arabī, *'Aḥkām*, vol. 2, 597. Reportedly, Ibn Rushd also convicted criminals who entered homes and threatened its inhabitants with weapons as they proceeded to rob them of banditry. See Ibn al-'Arabī, *'Aḥkām*, vol. 2, 601-2.

[885] Therefore, Ibn al-'Arabī, *'Aḥkām*, vol. 2, 598, argues that murder by stealth or assassination is a form of banditry.

[886] Ibn Rushd I, *al-Muqaddimāt*, vol. 3, 230, argues that a bandit who terrorizes society by means other than murder could be far more harmful to society than a bandit who murders someone.

[887] Ibid., vol. 3, 230-1, Ibn Rushd also mentions early Mālikī opinions which held that bandits who have become powerful or have eluded the law for a long time must be killed and the ruler does not have discretion to select a lesser punishment.

[888] Ibid., vol. 3, 234-6.

Importantly, after this long exposition on banditry, Ibn Rushd asserts that all that has been stated applies to those who fight for prurient interests (*yakhrujū fisqan wa khulū'ā*), but it does not apply to those who fight while relying on a system of belief such as *'ahl al-'ahwā'*. Those who rely on an interpretation should not be treated as bandits.[890] Ibn Rushd does not mention the traditional definition of rebellion; he does not talk in terms of an act of rebellion committed while relying on a *shawka* and an interpretation. Rather, his definitional approach is to first identify banditry, and then to argue that those who commit acts of banditry while relying on an interpretation should not be treated as bandits. Therefore, he seems to assume that rebels would commit acts that would qualify as banditry, if it was not for the existence of an interpretation. This is significant in two respects: One, it eventually led to the conclusion by some Mālikī jurists that rebellion, like banditry, could be committed by an individual, and that an individual could qualify as a *baghi*. Two, it clearly signaled the acceptance of the legal effect of the existence of a *ta'wīl* in the Mālikī school. This ultimately led to the widespread adoption of the laws of rebellion in the Mālikī school.

Dealing with the treatment of groups that rely on an interpretation, Ibn Rushd reports that there is some disagreement as to whether such a group should be held liable for life and property destroyed. Drawing upon the precedent of the Companions, he asserts that the Companions agreed upon the principle of no liability in these types of situations. He contends, however, that the ruler may choose to execute a rebel prisoner as long as the fighting is still in progress. As to the fate of these individuals after the fighting ends, Ibn Rushd notes that there is disagreement among the early Mālikī authorities on whether they should be asked to repent or be executed, or whether they should be pardoned.[891] Ibn Rushd's discourse on what he calls *ḥarb al-muta'awwilīn* (fighting by those with an interpretation) is short and non-committal. He does not refer to the doctrines developed by the other schools on rebellion, and does not use the word *bughā* or the terminology of the field of *'aḥkām al-bughā*. Nonetheless, Ibn Rushd produces the most systematic Mālikī justification for the idea of treating those who commit an illegal act while relying on an interpretation, as separate and distinct from bandits or common criminals. By doing so, he opened the door for a genuine Mālikī contribution to the discourses on rebellion. Mālikī jurists writing only a generation or two after Ibn Rushd readily accept the distinction between those with an interpretation and those without. For instance, Ibn Rushd's grandson, the judge Abū al-Walīd Ibn Rushd (Averroes) (d. 595/1198), reiterates the distinctions of his grandfather, and adds that whoever rebels while relying on an interpretation cannot be considered to be an unbeliever, and should not be held liable for his acts. He maintains that this principle was established on the basis of the precedent of the Companions.[892]

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[889] Ibid., vol. 3, 233. Ibn Rushd reports the opinion of the early jurist 'Abd al-Malik Ibn al-Mājishūn (d. 213/828-829) that funeral prayers should not be performed on bandits, and that they should not be buried. Rather, they should be left to dogs and wolves to eat their corpses.

[890] Ibid., vol. 3, 236.

The prominent Mālikī jurist and judge Ibn al-'Arabī (d. 542/1147) went even further. He adopted the terminology and categories of the jurists from the non-Mālikī schools, and argued that a *baghī* is one who rebels against a ruler seeking to overthrow him or who refuses to obey his commands while relying on a plausible interpretation.[893] A rebel should not be pursued or executed, and the fugitive, captive or wounded may not be dispatched. Pursuant to the example of the companions, he argued, rebels should not be held liable for life or property destroyed. Ibn al-'Arabī went even further in replicating the discourses of non-Mālikī jurists on the subject, and argued that the legal acts and adjudications of rebels should be recognized.[894] Importantly, Ibn al-'Arabī travelled extensively in the eastern Arab world and studied with prominent Shāfi'ī jurists such as al-Ghazālī, and it is likely that his thought was heavily influenced by these experiences.[895] However, Ibn al-'Arabī should not be considered a simple borrower of legal doctrine because he made a genuine contribution to the Mālikī discourses on rebellion -- a contribution which is one of the main doctrines of the revisionist trend. Building on the discourses of Ibn Rushd I regarding the duty of Muslims to join the righteous party, he claims that the Mālikī jurists have held that Muslims should always fight on the side of whoever is just, whether it is the ruler or the rebels. If neither party is just then every Muslim must remain neutral and not support either the ruler or the rebels. If, however, a Muslim's life or property is targeted by the ruler or rebels then that Muslim has a right to defend himself, and he or she is not considered an outlaw for doing so.[896]

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[891] Ibid., vol. 3, 237.

[892] Ibn Rushd II, *Bidāya*, vol. 2, 458.

[893] Ibn al-'Arabī, *'Aḥkām*, vol. 4, 1721.

Contrary to Ibn al-'Arabī's assertion, this was not the accepted Mālikī position before or during his time. As we saw, Mālikī discourses on rebellion continued to be rather ambivalent until well into the 6th/12th century. Clearly, Ibn al-'Arabī did not invent the position advocating not supporting unjust rulers.[897] However, he was giving expression to a position that was increasingly becoming prevalent among what I have called the revisionist trend. By articulating this position within the context of a systematic discourse on rebellion, Ibn al-ʻArabī facilitated the adoption of this position in the Mālikī revisionist trend.

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[894] Ibid., vol. 4, 1722.

[895] Al-Dhahabī, *Siyar*, vol. 20, 197-203; al-Ziriklī, *al-'A'lām*, vol. 6, 230. Ibn al-'Arabī lived in Andalusia in the city of Ishbīlīya. His father was a close companion of Ibn Ḥazm but Ibn al-'Arabī, himself, vehemently attacked Ibn Ḥazm on numerous occasions. Ibn al-'Arabī and his father traveled to Baghdād, Damascus, Jerusalem, Mecca and Egypt and studied with several notable jurists, among them Shāfi'ī jurists. He was appointed as a judge in Ishbīlīya but was removed reportedly because he was too harsh and stern. Ironically, he was also accused of adulating rulers and being too close to those in power.

[896] Ibn al-'Arabī, *'Aḥkām*, vol. 4, 1721.

[897] Ibid. In fact, Ibn al-'Arabī asserts that Ibn al-Qāsim reported that Mālik had held that if the ruler is just and is of the caliber of 'Umar b. 'Abd al-'Azīz, then he should be supported against those who rebel against him. Otherwise, Muslims should not aid a ruler against the rebels. However, the historicity of this report is doubtful. It is not widely reported by early Mālikī sources, and it did not have a serious impact on the development of early Mālikī discourses on the issue of rebellion.

After the age of Ibn Rushd I and Ibn al-ʻArabī, Mālikī discourses on rebellion may be seen in terms of a traditional and a revisionist trend. We will address the revisionist trend in the next section. However, as far the Mālikī traditional trend is concerned, it adopted the terminology and categories of *'aḥkām al-bughā*. It assumed that whoever disobeys or rebels against whoever is in power is a *bāghi*, and it relied on the existence of an interpretation as the main factor distinguishing rebels from bandits.[898] Like the traditional trend of the other Sunnī schools, the traditional trend in the Mālikī school focused on the treatment of rebels, and differentiated between the treatment due to rebels and the treatment due to bandits. In many ways, the Mālikī traditional trend became indistinguishable from the traditional trend of the other Sunnī schools of thought. Both in terms of its basic approach and in terms of its specific conclusions, the Mālikī traditional trend accepted the paradigms of the traditional discourse on rebellion. The legal transplant from the other Sunnī schools to the Mālikī school had become complete. However, as discussed below, Mālikī jurists continued to develop the law of banditry, and reasserted a position similar to the synthesis achieved by Ibn ʻAbd al-Barr. The Mālikī traditional trend did not explicitly argue, as Ibn ʻAbd al-Barr did, that if a rebel pursues means similar in nature to banditry, he or she no longer qualifies for the status of a *bāghi*. This trend, however, did argue, in effect, that means which rely on the use of terror for the propagation of rebellion are, in fact, criminal, and therefore, might lead to the disqualification of a rebel from the status of a *bāghi*.

The classic articulation of the law of rebellion from within the Mālikī traditional trend is that of the Egyptian Mālikī jurist Shihāb al-Dīn al-Qarāfī (d. 684/1285). Al-Qarāfī asserts that a *bāghī* is one who, while relying on an interpretation, rebels seeking to overthrow a ruler, refuses to obey the ruler's command, refuses to discharge a right or demand made upon him by the ruler.[899] He remarks that Mālikī jurists have disagreed over whether the rebels must be of sufficient number, for instance more than ten individuals, so that the ruler would need to employ considerable force in order to resist them.[900] This is a clear reference to the requirement of a *shawka* or degree of strength, but al-Qarāfī does not use the specific term *shawka*. He also notes that there is disagreement as to the status of the Khawārij because of the fact that the Khawārij espoused indiscriminate slaughter against all Muslims, and considered most of the Companions unbelievers.[901] Al-Qarāfī, and the other Mālikī jurists from the traditional trend, do not resolve the issues relating to the Khawārij or the requirement of *shawka*, but they go on to state that the rebels must be considered believers, and may not be fought once their rebellion comes to an end.[902] If the rebels are defeated, their wounded and fugitive may not be pursued or killed. But the ruler may kill the wounded and fugitive as long as the rebellion continues or if the rebels continue to enjoy reinforcements.[903] Prisoners of war, however, may not be killed, and even if the rebels kill loyalist hostages, the loyalists cannot reciprocate in kind.[904] Al-Qarāfī argues that the ruler may use weapons of mass destruction such as flame throwers, flooding and mangonels against the rebels unless there is a reasonable chance that innocents may be harmed in the process; then weapons of mass destruction may not be used. He defines innocents as anyone who might not share the views of the rebels or loyalists who might reside in the targeted areas. Nonetheless, other Mālikī jurists are even less accepting of the permissibility of using weapons of mass destruction.[905] The corpses of rebels may not be mutilated, and their heads may not be severed and sent across the lands, or be placed on display by being raised on spears.[906] Al-Qarāfī adds that killed loyalists are to be treated as martyrs. Loyalists should not perform funeral prayers on killed rebels. Nevertheless, the families and compatriots of rebels should be given an opportunity to perform funeral prayers for the killed rebels and then the corpses should be properly buried.[907] Importantly, the Mālikī traditional trend repeats what had become the earmark of the field of *'aḥkām al-bughā*: as long as the rebels have an interpretation or cause on which they rely, they are not to be held liable for anything destroyed during the course of their rebellion. Loyalists and rebels are liable, however, for anything destroyed before or after the rebellion. Al-Qarāfī, and others, add that those who fight out of tribal reasons (*'aṣabiyya*) and not a principled cause or interpretation are liable for their actions.[908]

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[898] See, for example, al-Wansharīsī (d. 914/1508), *al-Miʻyār*, vol. 5, 34, vol. 11, 129-130, emphasizing the need to obey even an unjust ruler. Al-Wansharīsī asserts that normally doing *duʻā'* (supplications or prayer asking God for some favor) in support of rulers is not allowed. However, he argues, in his day and age, it had become necessary to pray for rulers because sedition and corruption had become widespread, Ibid., vol. 6, 385.

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[899] Shihāb al-Dīn 'Aḥmad b. Idrīs al-Qarāfī, *al-Dhakhīra* (Beirut: Dār al-Gharb al-Islāmī, 1994), vol. 12, 5. See Abū 'Abd Allāh Muḥammad b. 'Aḥmad b. Muḥammad b. Juzayy al-Kalbī al-Gharnāṭī (d. 741/1340), *al-Qawānīn al-Fiqhiyya* (Beirut: Dār al-Kitāb al-'Arabī, 1989), 368; Ibn Farḥūn (d. 799/1396), *Tabṣira*, vol. 2, 191. Khalīl b. Isḥāq, *Mukhtaṣar Khalīl*, ed. 'Aḥmad Naṣr (Cairo: al-Maktaba al-Mālikiyya, 1981), 282, reproduces the same definition but adds that the *'adl* has a right to fight them. It is not clear whether *'adl* in this context means just ruler or rightful ruler. Ṣāliḥ 'Abd al-Samī' al-'Ābī al-Azharī (a contemporary commentator on Khalīl), *Jawāhir al-'Iklīl Sharḥ Mukhtaṣar al-'Allāma al-Shaykh Khalīl* (Beirut: al-Maktaba al-Thaqāfiyya, 1347 AH), 277, adds that the rebels are those who disobey the ruler concerning a command that does not involve disobeying God.

[900] Al-Qarāfī, *al-Dhakhīra*, vol. 12, 5.

[901] Ibid., vol. 12, 6. Al-Kalbī, *al-Qawanīn*, 369, states that the Khawārij are *bughā*.

[902] Ibid., vol. 12, 6. Ibn Farḥūn, *Tabṣira*, vol. 2, 191, citing a Ḥanbalī jurist, argues that there is a distinction between the *bughā* and *ahl al-bida'* (sectarians). He asserts that sectarians must repent or be killed. But he does not systematically distinguish rebels from sectarians other than by implying that sectarians adopt heretical beliefs. The idea that sectarian groups should repent or be killed, as we saw earlier, finds support in several Mālikī and Ḥanbalī sources.

[903] Al-Qarāfī, *al-Dhakhīra*, vol. 12, 7. Interestingly, al-Qarāfī cites the *ḥadīth* attributed to the Prophet which states that the law of God with regard to rebels is that the fugitive, wounded and captive may not be killed. But the version which he cites now adds "unless it is feared that they will return [to rebellion] (*'in*

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lam ya'man rujū'ahum)." This is obviously a late addition to the report. See, also, Ibn Farḥūn, *Tabṣira*, vol. 2, 191; al-Kalbī, *al-Qawānīn*, 369; Khalīl, *Mukhtaṣar*, 282.

[904] Al-Qarāfī, *al-Dhakhīra*, vol. 12, 9, 11, 12. Al-Kalbī, *al-Qawānīn*, 369, and Ibn Farḥūn, *Tabṣira*, vol. 2, 191, add that although the prisoner may not be killed, he should be punished and imprisoned until he repents.

[905] Al-Qarāfī, *al-Dhakhīra*, vol. 12, 8; Ibn Farḥūn, *Tabṣira*, vol. 2, 191, states that the *'adl* specifically may use weapons of mass destruction. It is not clear whether he means the rightful ruler or just ruler, but, in this context, it is likely that al-Qarāfī means the rightful ruler. Al-Kalbī, *al-Qawānīn*, 369, argues that the ruler may not use weapons of mass destruction and may not cut down trees or burn rebel homes.

[906] Al-Qarāfī, *al-Dhakhīra*, vol. 12, 12; Khalīl, *Mukhtaṣar*, 282; al-'Ābī, *Jawāhir*, 277.

[907] Al-Qarāfī, *al-Dhakhīra*, vol. 12, 12.

[908] Al-Qarāfī, *al-Dhakhīra*, vol. 12, 10; Khalīl, *Mukhtaṣar*, 282; al-Kalbī, *al-Qawānīn*, 369.

Furthermore, Mālikī jurists continued to disagree over whether the legal acts and adjudications of the rebels should be recognized and given effect.[909]

The Mālikī discourses of the traditional trend are redundant; they adopt the terminology and categories of the traditional trend in general, and add very little to the inherited positions. It is difficult to conceive of a specific historical context to which Mālikī jurists such as al-Qarāfī were responding. Rather, the style and tone of the discourses clearly demonstrate that these discourses were the product of legal borrowing from the other Sunnī schools. In other words, after Ibn Rushd I provided the ideological grounding, the adoption of *'aḥkām al-bughā* into Mālikī discourses was largely in response to legal culture, and in response to the pervasiveness of these doctrines in Islamic legal culture. But as discussed earlier, Mālikī jurists, in response to a pervasive historical reality, had developed an extensive discourse on the law of banditry, and it is in this field which the Mālikī school made a genuine contribution. As noted earlier, Mālikī jurists argued that the essential components of the crime of banditry is that it relies on the element of terror and that it renders its victims helpless. Therefore, those who commit highway robbery or terrorize the wayfarer are bandits. But, even more, it is irrelevant whether the armed robbery is committed in a town or in the desert, or whether it is committed inside a house or on a street. Furthermore, an assassin who kills stealthily, a murderer who strangles his victim, or a criminal who uses a narcotic to drug his victim before robbing him, are all treated as bandits. Importantly, in order for the elements of the crime of banditry to exist, the criminal does not need to have an intent to commit robbery. In other words, an intent to usurp property or gain possession of property is not a constitutive element of the crime of banditry. Rather, it is sufficient that the criminal commit acts that by definition rely on the helplessness of the victim, and have the effect of spreading terror. Mālikī jurists often exemplify this point by stating that if a person or group, for whatever reason, decide to use the threat of harm in order to prevent people from traveling from one point to another, such a person or group are bandits. Therefore, if people avoid traveling through a particular road out of fear of being harmed by a certain group, then the group is to be treated as bandits. For the crime of banditry to exist, it is sufficient that the group had taken concrete steps to terrorize people such that people would have a realistic fear of harm, and such that due to this fear, people would comply with the demands of the bandits. Consequently, Mālikī jurists often state that those who use the threat of harm or terrorize their victims in order to commit rape are bandits as well.[910]

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[909] Al-Qarāfī, *al-Dhakhīra*, vol. 12, 10; Khalīl, *Mukhtaṣar*, 282; al-'Ābī, *Jawāhir*, 277; al-Kalbī, *al-Qawānīn*, 369.

Mālikī jurists continued to give the ruler broad discretion in dealing with bandits.[911] However, the ruler does not have discretion to pardon the bandits for their crimes unless they repent before they are captured.[912] Even then, these jurists continued to repeat that the repentance of bandits does not affect the right of the victims to demand retaliation or compensation. Mālikī jurists limited the discretion of the ruler somewhat by demanding that he does not punish according to whim and that he consults the jurists regarding the appropriate penalty in each situation.[913] Al-Qarāfī, for example, argues that there should be proportionality between the crime committed or the threat posed and the penalty imposed. He argues that if a bandit commits murder, he or she must be killed and a lesser penalty should not be permitted. If the bandit commits murder, usurps property and terrorizes people, the bandit should be crucified and then killed, but he or she should not be amputated from opposite ends. If the bandit is not particularly dangerous and has not committed murder, then it is preferable that the ruler would beat, imprison or exile the bandit.[914] Nonetheless, the main emphasis in Mālikī discourses is on flexibility in dealing with the crime of banditry. Mālikī jurists emphasize that the penalty should be in proportion to the actual threat of harm that the bandit poses, and not necessarily in direct correlation to the specific offense committed.[915]

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[910] Al-Qarāfī, *al-Dhakhīra*, vol. 12, 10, 123-5; Ibn Farḥūn, *Tabṣira*, vol. 2, 184-5, 189; Ibn 'Āṣim, *Tuḥfa*, 280; al-Nafrāwī, *al-Fawākih*, 217, 222; al-'Ābī, *Jawāhir*, 294; al-Kalbī, *al-Qawānīn*, 367; Khalīl, *Mukhtaṣar*, 290; 'Uthmān b. Ḥusayn Barrī al-Ja'alī, *Sirāj al-Sālik Sharḥ 'Ashal al-Masālik* (Cairo: Sharikat Maktabat Muṣṭafā al-Bābī al-Ḥalabī, n.d.), vol. 2, 227-8.

[911] For example, al-Tasūlī, *al-Buhja*, vol. 2, 348-9, 360-2, argues that the ruler must be given wide discretion not only in punishing bandits but in punishing groups that might give indirect support to bandits. He also argues that considering that the crime of banditry is particularly destructive and that it is very widespread, the rules of evidence should be liberalized so that the crime of banditry may be more readily proven. Wide discretion is also given to judges in dealing with banditry, see al-Wansharīsī, *al-Mi'yār*, vol. 2, 285-6.

[912] However, some late Mālikī jurists state that when a member of a group of bandits was executed in North Africa, his group would retaliate by wreaking havoc in the land. In this situation, they argued, it is permissible for the ruler not to execute bandits because the evil of such a punishment outweighs its benefits. See, for instance, al-'Adawī, *Ḥāshiya*, vol. 2, 254; al-Nafrāwī, *al-Fawākih*, vol. 2, 223.

[913] Ibn Farḥūn, *Tabṣira*, vol. 2, 187; al-Kalbī, *al-Qawānīn*, 368; al-Qarāfī, *al-Dhakhīra*, vol. 12, 126.

The question remains, however, as to the status of rebels who might rely on an interpretation but otherwise pursue means that resemble the means pursued by bandits. If rebels, for instance, kill by stealth or terrorize the wayfarer, are they still treated as *bughā* or as bandits? The answer is provided in a two-part response. Mālikī jurists often state that rebels may not be treated as bandits. Furthermore, if the bandits act out of competition for power, enmity, or rancor (*'imra*, *'adāwa* or *thā'ira*), they are not to be treated as bandits. If a people are motivated by a specific enmity or a desire to seek revenge against a person or a group, they may not be treated as bandits. Similarly, if a people commit acts of banditry because they seek to overthrow the ruler or come to power, they may not treated as bandits. In these circumstances, those individuals are to be treated as common criminals who are held liable for their acts under the regular criminal penalties of *Sharī'a*.[916]

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[914] Al-Qarāfī, *al-Dhakhīra*, vol. 12,126; al-Wansharīsī, *al-Mi'yār*, vol. 2, 285-6. Interestingly, al-'Ābī, *Sharḥ Muslim*, vol. 6, 97, says that the custom in Tunisia was to exile bandits out of the jurisdiction of the governorship in which the crime was committed or to banish bandits on boats – meaning that they would be exiled overseas. He also reports that the Mālikī judge Muḥammad b. 'Abd al-Salām (d.749/1348) related that a bandit was banished from Tunisia to the east. The jurists of the east protested that banishing such a person to the east is improper because he is bound to cause corruption. Tunisian jurists responded that such an action was justified because it was not known, to a degree of certainty, that such a person would once again commit banditry.

[915] Ibn Farḥūn, *Tabṣira*, vol. 2, 187-8; al-Nafrāwī, *al-Fawākih*, vol. 2, 222; al-'Ābī, *Jawāhir*, 295; al-Ja'alī, *Sirāj*, vol. 2, 228; al-'Adawī, *Ḥāshiya*, vol. 2, 254; al-Tasūlī, *al-Buhja*, vol. 2, 360-1.

[916] Al-Qarāfī, *al-Dhakhīra*, vol. 12,123; al-Nafrāwī, *al-Fawākih*, vol. 2, 222; al-Kalbī, *al-Qawānīn*, 367, 368-9; Ibn 'Āṣim, *Tuḥfa*, 280; Ibn Farḥūn, *Tabṣira*, vol. 2, 185-6. However, Abū 'Abd 'Allāh Muḥammad al-Khirshī (d. 1101/1689-90), *Sharḥ Mukhtaṣar Sayyidī Khalīl* (Beirut: Dār Ṣādir, n.d.), vol. 8, 103-4, argues that if a person commits acts of banditry for the purpose of usurping power, he or she is to be treated as a *bāghī*.

Therefore, if rebels, who might otherwise qualify as *bughā*, commit acts of banditry, they are not to be treated as bandits, but they are to be treated as common criminals. This position is a development from the synthesis achieved by Ibn 'Abd al-Barr between the laws of rebellion and banditry. But unlike Ibn 'Abd al-Barr's synthesis, the late Mālikī position protects rebels, who in good faith rely on an interpretation and commit acts of banditry, from being treated as bandits. At the same time, rebels who pursue means oriented towards the spread of terror are denied the liberal treatment of *'aḥkām al-bughā*. The Mālikī position is somewhat similar to the position adopted by jurists from the other schools which maintained that rebels are exempt from liability for life and property destroyed only if the destruction was reasonably related to the act of rebellion. Arguably, acts of banditry could be declared to be unrelated to a reasonable propagation of a rebellion. In other words, arguably, certain acts could, by definition, be excluded from the protection afforded by the status of *baghy*. In fact, several non-Mālikī jurists adopt this position. For instance, the Shāfi'ī jurist al-Shirbīnī (d. 977/1569-70) adopts the position that an act of rape is not protected under the laws of rebellion because, by definition, rape is not an acceptable means of propagating rebellion (*lā ta'alluq lahu bi'l qitāl*).[917] In this situation, despite the existence of an interpretation, the person who commits rape is treated as a common criminal.[918]

Mālikī and non-Mālikī jurists of the traditional trend ended up preserving the technical rules of the laws of rebellion. These rules primarily focused on the treatment due to those who rebel while relying on an interpretation. Initially, due to specific historical circumstances in the early Islamic polity, these discourses developed as a moral, and perhaps legal, restraint on the discretion of rulers in dealing with dissent and rebellion. The corporate legal culture of the jurists was not willing to concede unfettered discretion to rulers in dealing with rebels. Furthermore, many jurists insisted on retaining the power to differentiate between a rebel and a legitimate ruler. The traditional trend arose out of the fact that a wide discrepancy had developed between the advocated ideals of *'aḥkām al-bughā* and the political reality. Many jurists had developed a vested interest in the political institutions of the day. More importantly, after the weakening of the 'Abbāsid Empire, rebellions, insurrections and secessions had become very widespread, and at times, the situation presented a state of anarchy. Nevertheless, the traditional trend continued to repeat the inherited doctrines of *'aḥkām al-bughā.* This was largely due to the power of legal precedent and the influence of legal culture on the legal mind. Substantively, the traditional trend focused on the duty of obedience to those in power -- that became its primary focus. Otherwise, the main contribution of the traditional trend was to limit the scope of the laws of rebellion in order to exclude certain means from its coverage. The discourses on rebellion were too entrenched in Muslim legal culture to be abandoned or eradicated altogether. Nonetheless, the traditional trend argued that either certain groups, such as the Khawarij, or certain acts, such as rape, are not to be protected under the rules of *'aḥkām al-bughā.*

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[917] Al-Shirbīnī, *Mughnī*, vol. 4, 125-6. Al-Shirbīnī notes that several jurists have adopted this position.

[918] I will address the crime of rape later.

Al-Wansharīsī's *Responsa* and the Possible Impact of the Traditional Trend

It is difficult to assess to what extent *'aḥkām al-bughā* impacted the day-to-day dynamics of Islamic law and politics. This issue needs a far more exhaustive study, and cumulative investigations focused on specific historical periods and geographic areas. However, it would be useful to introduce some evidence of how certain jurists, particularly Mālikī, from the traditional trend dealt with the general issue of dissent. Several *responsa* preserved in the works of the Mālikī jurist al-Wansharīsī (d. 914/1508) deal with what he calls "the misguided groups and secessionist rebels" (*al-ṭawā'if al-ḍālla wa al-bughāt al-munshaqqīn*). These *reponsa*, however, do not deal with the treatment of rebels in the course of rebellion. Rather, they deal with groups that have separated or seceded from the general Muslim community but have not resorted to armed rebellion. We have already mentioned al-Wansharīsī's *responsa* regarding the illegality of rebelling against unjust rulers. However, in the *responsa* discussed below, al-Wansharīsī reproduces the opinions of jurists regarding a sect from the Khawārij known as Wahbī 'Ibāḍīs, and similar sectarian factions. According to the text, the groups addressed were not seditious Sunnī rebels, but sectarian groups accused of propagating heretical beliefs. Of course, one cannot exclude the possibility that the accusation of sectarianism was leveled against otherwise "orthodox" political opponents[919] or, alternatively, that opposition to political regimes was expressed in terms of "unorthodox" theological beliefs.[920] The *responsa* records the opinions of jurists from the 4th/10th to the 10th/16th centuries. Therefore, one must be careful not to assume that the *responsa* represents the developed Mālikī position on all points addressed.

In the first set of *responsa,* Mālikī jurists are asked about a group, reportedly from the 'Ibaḍī sect, that lived in the Maghrib in the midst of Sunnī Muslims. They lived in certain territories in which they built their own mosques. Furthermore, according to the unidentified questioners, they intermarried with Mālikī woman because by marrying such women, they sought to gain legitimacy and acceptance in the Sunnī community. Those seeking the *responsa* inquire about three distinct issues. First, if the territories come under the control of Sunnī governors, may the mosques be torn down? Second, may they be beaten and forced to adopt the Mālikī school of thought? Third, should their marriages to Mālikī women be nullified?[921]

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[919] This suspicion is supported by the fact that the description of the theological belief system of these groups is very ambiguous. They are described as 'Ibāḍīs (Khawārij), as Rāfiḍīs (Shī'ites), as 'Imāmīs (Shī'ites), and as *ahl shaṭāra* (people of corruption), see al-Wansharīsī, *al-Mi'yār*, vol. 2, 445, 449, vol. 7, 218-9.

[920] This suspicion is supported by the fact that there are constant references in the *responsa* to the fact that these groups attracted and misled the laity or that such groups tended to be popular among the laity.

[921] Al-Wansharīsī, *al-Mi'yār*, vol. 2, 445-6, vol. 10, 149-150.

Al-Wansharīsī reports that Mālikī jurists disagreed on whether the mosques should be torn down. Relying on the incident of the *ḍirār* mosque at the time of the Prophet, some jurists argued that these mosques should be torn down.[922] Tearing down these mosques would have the effect of demoralizing, and undermining the influence of these groups (*fīhi dhilla lahum*).[923] Other jurists argued that, on principle, the mosques should not be torn down, but that the mosques must come under Sunnī control and the followers of the deviant sect must be denied access to such mosques. Some added that if the mosques have become a symbol for the power of these sects or have become irrevocably associated in the minds of people with the deviant sect, then it is permissible to tear them down.[924] Several jurists argued that the decision hinges on whether these mosques were built for the specific purpose of serving these groups or whether the mosques were initially built for proper purposes, and later on, these groups gained control of such mosques. In this context, al-Wansharīsī relates a *responsa* in which a man built a mosque in Andalusia, but after the mosque was built, a deviant group (*ahl al-sharr*) and unveiled women (*mutabarrijāt al-nisā'*) started frequenting it and gained control of it. The man who built the mosque asked whether the mosque should be torn down.[925] Several Mālikī jurists argued that if it was initially built for appropriate purposes, it should not be torn down. They added that if the location of the mosque is such that it would benefit the public, it should not be torn down, but that the deviant group should be prevented from accessing it. If the location of the mosque, however, lends itself to being exploited by the deviant group, then it should be torn down. Some Mālikī jurists disagreed, and argued that the focus should be on preventing the deviant group from gaining access to the mosque, but under all circumstances, the mosque should not be torn down.[926]

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[922] The incident of the *ḍirār* mosque is documented in the Qur'ān 9:107. Reportedly, at the time the Prophet was in Medina, a group of hypocrites built a mosque in which they met and prayed. The Prophet, reportedly, perceived the mosque as a source of dissension and division and tore it down.

[923] Al-Wansharīsī, *al-Mi'yār*, vol. 2, 447, vol. 10, 14, 151.

[924] Ibid., vol. 2, 446, 447, vol. 10, 150-153. In another *responsa*, al-Wansharīsī reports on the status of a mosque that was created as a trust (*maḥbas*) for indigent 'Ibāḍīs. Mālikī jurists disagreed on whether the trust should be nullified or restructured so that the objects of the trust would accrue to the benefit of indigent Sunnīs. See Ibid., vol. 7, 362-3.

[925] Ibid., vol. 7, 218.

Al-Wansharīsī also reports on an incident that took place during the time of the Shāfi'ī jurist Jalāl al-Dīn al-Suyūṭī (d. 911/1505). A group from the Khawārij used to pray in a separate mosque close to the Prophet's mosque in Medina. Al-Suyūṭī ruled that the mosque should be closed, and that the group be forced to pray with the rest of the Muslim community in the main mosque in Medina. Later on, the same group separated itself from the community and built a prayer area in which they met and prayed, but they did not rebel and did not openly defy the authority of the governor. The governor of Medina consulted with the jurists regarding this affair, and reportedly all the Shāfi'ī, Mālikī and Ḥanafī jurists in Medina agreed that the prayer area should be demolished, and that the group should be forced to pray with the rest of the community.[927]

The matter of whether dissenting groups should be allowed to maintain their own mosques implicates the much larger issue of the role of mosques as communal places of worship. In principle, mosques are communal places of worship in which the whole community has an interest and right to worship. Theoretically, mosques belong to God and should be accessible to the whole community. This, however, begs the question: Who has the right to define the community, and who has the right to define orthoproxy in such mosques? Forcing the various theological and political schools of thought to worship together is a tacit acceptance of both diversity and the need for unity. A balance needs to be struck between the idea of accessibility of all mosques to the whole community, and the attendant institutional reality that full accessibility will also mean an inevitable compromise of diversity. Accessibility of mosques to all trends and schools of thought will require a certain degree of voluntary or involuntary consensus-building and, hence, a compromise of diversity. On the other hand, permitting dissenting groups to maintain their own separate places of worship, by necessity, means accepting the idea of diversity, but also the idea that mosques do not need to be accessible to all. Permitting various groups to maintain separate places of worship constitutes a tacit acceptance of both the idea of diversity and the idea of inaccessibility of places of worship. But even more, allowing separate groups to maintain separate places of worship concedes that consensus-building is not possible, and, ultimately, may constitute not just an acceptance of diversity, but also the acceptance of fragmentation.

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[926] Ibid., vol. 7, 219-20. Ibn Farḥūn, the Mālikī jurist, argued that the decision of whether or not to tear down the mosque hinges on the purposes for which the mosque was built in the first place. See Ibid., vol. 2, 447. Farḥūn's argument relates to the following Qur'ānic verse: "A mosque whose foundation was laid from the first day on piety is more worthy of thy standing forth [in it for prayer]... " See Qur'ān 9:108-109.

[927] Ibid., vol. 2, 448.

The extent to which these considerations motivated the discourses on jurists needs a more extensive study. Nonetheless, it is important to note that in the precedent of the group in Medina, unlike the group in Maghrib, there is no suggestion that the dissenting group should be punished or forced to abandon its beliefs. Rather, the emphasis is on denying the group its institutional separateness or autonomy. There is no discussion in the Mālikī Andalusian *responsa* regarding the unveiled women frequenting a certain mosque or whether the group should be compelled to abandon its beliefs. Furthermore, there is no elaboration upon the belief system of this group. However, there is reference to the fact that the group lived in the mountains, and that the unveiled women of that mountain were not a novel social phenomenon. The Mālikī judge of Qurṭuba, Muḥammad b. al-Salīm (d. 367/977), held that this group should be prevented from accessing the specific mosque in question, but did not recommend any other measures.[928]

The Mālikī *responsa*, however, dealing with 'Ibaḍī groups, addressed at length whether or not these groups should be punished and forced to abandon their system of belief. The Mālikī jurist Abū al-Ḥasan al-Lakhmī (d. 478/1085) argued that groups such as the 'Ibaḍīs are a great threat to religion. They cause considerable corruption by attracting and misguiding the laity, and, in fact, are worse than the Christians and Jews. People know that the Christians and Jews are not Muslims, he argues, and so people are not in danger of being deceived by the followers of these religions. However, the 'Ibāḍīs claim that they are Muslim and quote the Qur'ān and *ḥadīth*, and hence, people are easily deceived and misled by them. Therefore, the 'Ibāḍīs should not be left to intermingle with people, and should be imprisoned and beaten until they repent. Even if they repent, as long as they have associates that have not yet been captured, they should not be released from prison. If all of their associates have been captured, and they have repented, then they may be released. If, however, they did not repent, al-Lakhmī notes that there is disagreement as to whether or not they should be killed.[929] Al-Lakhmī lived before the development of the Mālikī traditional trend, and therefore, it is not clear whether his opinions represent a specific historical trend in Mālikī jurisprudence. Nevertheless, al-Wansharīsī gives the impression that the notion that groups such as the 'Ibāḍīs should be beaten and forced to abandon their beliefs was not an anomaly in his time.[930] Furthermore, al-Wansharīsī reports on a set of *responsa* that deal with the limitations of proper educational and social interactions with such groups. Al-Wansharīsī mentions *responsa* regarding the permissibility of teaching the Khawārij and their children the Qur'ān and the art of writing. Some Mālikī jurists argued that one should not teach the Khawārij writing or the sciences, such as mathematics, in territory which is under their own control because this is bound to strengthen them. However, in all circumstances, teaching the Khawārij the Qur'ān is permissible. Other jurists argued that if the territory is under the Sunnī ruler's control, it is preferable not to teach them either the Qur'ān or writing and the sciences. Literacy or knowledge is bound to strengthen the Khawārij and aid their ability to convert others to their way of thought.[931]

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[928] Ibid., vol. 7, 219-20.

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[929] Ibid., vol. 2, 446-7, vol. 10, 150-1, vol. 11, 168-9.

[930] Ibid., vol. 2, 447-8, vol. 11, 168.

[931] Ibid., vol. 8, 237.

The dichotomy between the Mālikīs and the 'Ibāḍī Khawārij is further emphasized in the *responsa* dealing with the marriage of an 'Ibāḍī to a Mālikī. Al-Wansharīsī reports that the Mālikī jurist Abū Qāsim al-Sayūrī had held that after a territory, dominated by the 'Ibāḍīs, had come under Mālikī control, the marriage of an 'Ibāḍī to a Mālikī should be abrogated.[932] However, the reasoning behind this view is not clear. As noted above, it was argued that the 'Ibāḍī's used to marry Mālikī women in order to gain legitimacy with Sunnīs, and it is possible that al-Sayūrī's opinion is justified by a pragmatic social and political consideration aimed at combating 'Ibāḍī legitimacy. Nonetheless, al-Wansharīsī mentions a lengthy discussion blaming rulers for being too lax in accepting the testimony of 'Ibāḍī witnesses in issues relating to marriage and divorce. According to al-Wansharīsī, the testimony of 'Ibāḍī witnesses is problematic because the 'Ibāḍī law of marriage and divorce is inconsistent with Mālikī law in a variety of important respects.[933] Therefore, al-Wansharīsī implies that the marriage of an 'Ibāḍī to a Mālikī should be abrogated because Mālikī law is irreconcilable with 'Ibāḍī law. Furthermore, al-Wansharīsī quotes a discussion by al-Lakhmī in which al-Lakhmī argues that all the legal acts performed by 'Ibāḍīs during a time in which they controlled a certain territory are null and void. Al-Lakhmī contends that the 'Ibāḍī's, in the *responsa* mentioned above, were not usurpers (*mutaghallibūn*) so one cannot claim that they acquired a degree of legal autonomy from the legitimate ruler. Further, they were not deputized (*lam yufawwaḍ 'ilayhim*) by the legitimate ruler as his agents, and therefore, their legal acts including marriages, cannot be recognized.[934] It is not clear which of these factors is the most material to the idea of abrogating the marriage of an 'Ibāḍī to a Mālikī. Importantly, however, none of the rationale cited above maintains that such a marriage should be abrogated because the 'Ibāḍī's are considered infidels.

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[932] Ibid., vol. 2, 446, vol. 11, 168.

[933] Ibid., vol. 2, 448-9.

[934] Ibid., vol. 2, 449. Al-Wansharīsī also mentions the opinions of various Mālikī jurists that the testimony of sectarians (*ahl-al-'ahwā' wa al-bida'*), as a general matter, should not be accepted, see Ibid., vol. 2, 451.

As cautioned above, one should not attempt to read too much into the *responsa* preserved in al-Wansharīsī. However, one suspects that although the Mālikī traditional trend transplanted the legal discourses on rebellion into Mālikī jurisprudence, the social and political dynamics of the Mālikī school, particularly in the Maghrib, functioned in a far more complex fashion than the dogmatic positions on rebellion would lead us to believe. Mālikī legal discourses in the Maghrib, particularly after the 6th/12th century, exhibited a certain exclusionary attitude that sometimes bordered on xenophobia.[935] Importantly, however, despite the complex social and political reality and the tendency of the Mālikī school towards exclusion and rejection of the "other," a traditional trend did develop in Mālikī jurisprudence. As argued above, largely in response to the influence of legal culture after the 6th/12th century, the Mālikī jurists joined their Sunnī counterparts in adopting and propagating the law of rebellion in Islam.

The Revisionist Trend

Jurists of the revisionist trend often express skepticism about both rulers and rebels of their day and age. Najm al-Dīn al-Ṭarsawī (d. 758/1356-7), for example, somberly notes that there isn't a just ruler in the world today,[936] while Fakhr al-Dīn al-Zayla'ī (d. 743/1343) maintains that in his age, government is a function of raw power, and it is impossible to distinguish the just from the unjust because everyone fights over worldly affairs.[937] This is not just commentary expressing disillusion with the political affairs of their age. Rather, it is commentary about the role and utility of the discourses on rebellion. These observations are often made in the context of the discussions on *'aḥkām al-bughā*, and, therefore, connote a certain degree of dissatisfaction with the traditional discourses on rebellion. As discussed earlier, *'aḥkām al-bughā* continued to be propagated by the power and force of legal culture, but a substantial disparity developed between the initial critical purposes of this field of law, and the *proforma* repetition of the doctrines. Muslim jurists of the post-6th/12th centuries responded to the circumstances which developed in the 4th/10th century by emphasizing the need for order and stability, and the need to avoid rebellion. But Muslim jurists continued to repeat the traditional doctrines of *'aḥkām al-bughā* as an established part of Islamic law without substantial revisions. The main area of development was in limiting the range of means recognizable as a legitimate method of rebellion, and hence, protected by the law of rebellion. This does not mean that the discourses on rebellion had ceased being a method of criticizing the practices of rulers against rebels. In fact, I have argued that largely because of the field of *'aḥkām al-bughā,* one cannot describe the attitude of Muslim jurists, even from the traditional trend, as quietist. Rather, the attitude of the jurists from the traditional trend was thoroughly legalistic. Even if the ruler was unjust, it was illegal to rebel; but it was also illegal to mistreat rebels or to suppress rebellion outside the bounds permitted by the law. Furthermore, as we saw, the jurist Ibn Mufliḥ (d. 763/1361) used the traditional discourses on rebellion and banditry to argue, for instance, that the Mongols, even if they converted to Islam, should be considered the equivalent of bandits, and treated as such.[938] But the emphasis of the traditional trend had been on advocating the impermissibility of rebellion, and otherwise, on preserving the doctrines of rebellion as inherited from the cumulative legacies of legal culture.

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[935] See Abou El Fadl, "Islamic Law and Muslim Minorities," 153-7.

[936] Najm al-Dīn b. 'Alī al-Ṭarsawī, *Tuḥfat al-Turk fī mā Yajib 'an Yu'mal fī al-Mulk*, ed. Riḍwān al-Sayyid (Beirut: Dār al-Ṭalī'a, 1992), 121.

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[937] Al-Zayla'ī, *Tabyīn*, vol. 3, 294. See also al-'Ayīnī (d. 855/1451), *al-Bināya*, vol. 6, 735, who asserts that, in his time, it is impossible to distinguish between the just and unjust because everyone fights over worldly affairs.

[938] Ibn Mufliḥ, *al-Furū'*, vol. 6, 162.

Nevertheless, a large number of jurists, especially since the 6th/12th century, re-oriented and redirected the discourses on rebellion in substantive and considerable ways. They effectively reasserted the discourses on rebellion as a means of moral and legal criticism against objectionable power dynamics and as a means of defiance against unjust rulers. Importantly, the revisionist jurists did not reject the majority of the inherited discourses on rebellion. In fact, for the most part, they restated the same rules of conduct, but they also instituted substantive changes which redirected the focus of the discourses. Furthermore, the revisionist jurists did not reject the imperative of law and order. Rather, as we will see below, they continued to state that as a matter of principle, rulers should be obeyed and rebellion should be avoided. In fact, Ibn Jamā'a (d. 733/1332-3), the Shāfi'ī jurist, often cited as the epitome of juridical pragmatism and quietism, was among the jurists of the revisionist trend. However, while the jurists of the revisionist trend insisted on the need for order and stability, they also expanded the scope of *'aḥkām al-bughā* in significant ways and refused to lend support to unjust rulers.

Ibn Taymiyya as a Revisionist

Most of the jurists of the revisionist trend tended to be from the Shāfi'ī, Ḥanafī and Mālikī schools of thought. However, one of the most notable critics of the traditional discourses on rebellion, and one of the most notable revisionists was the Ḥanbalī jurist, Ibn Taymiyya (d. 728/1327-8). It is doubtful that Ibn Taymiyya would have described himself as a revisionist[939] since, as discussed earlier, he accuses the Kūfans and al-Shāfi'ī of inventing the discourses on *'aḥkām al-bughā*, and tends to be rather hostile to the whole field. Nonetheless, besides being an avid critic of the discourses of the traditional trend,

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[939] Of course, the terms traditional or revisionist are interpretive categorizations that I have adopted. Muslim jurists speak of *'aḥkām al-bughā* as if it is a unitary field that has not experienced development or change.

Ibn Taymiyya ends up replicating, to a large extent, the reconstructive efforts of the revisionist trend.

Ibn Taymiyya's main objection to *'aḥkām al-bughā* as a field is that it equates and confuses political and religious wars. Religious wars are the fighting or resisting of sectarians such as the Khawārij. By their nature, they are just and permissible in order to protect religion from corruption. Political wars are contests over power and worldly affairs, and so they are a *fitna* and impermissible. Ibn Taymiyya contends that the Kūfan jurists and al-Shāfi'ī, and most other jurists since then, have confused the two types of wars, and erroneously equated fighting groups such as the Khawārij with fighting rebels. The reason for this confusion, Ibn Taymiyya argues, is that these jurists misunderstood or mischaracterized the battles that took place between the companions at the time of 'Alī. These jurists treated conflicts over power as equivalent to conflicts over religion, and hence, did not distinguish between fighting the Khawārij and fighting rebels.[940] The two cannot be equated because while fighting the Khawārij is a praiseworthy act, fighting rebels is simply a part of an unlawful *fitna*. The wars between the Companions was a *fitna* that should have been avoided. Ibn Taymiyya concedes that in the wars between the Companions, the various contending parties had relied on a plausible cause or interpretation and, therefore, all the parties will go to heaven, and no side is blameworthy. But he insists that most of the Companions refused to get involved in the civil war, that it would have been better not to fight for or against 'Alī, and that even 'Alī himself, eventually regretted his decision to become involved in these wars.[941]

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[940] Ibn Taymiyya, *Majmū'*, vol. 4, 450-2; Idem, *al-Fatāwā,* vol. 3, 443; Idem, *Minhāj*, vol. 2, 233.

[941] Ibn Taymiyya, *Majmū'*, vol. 4, 431-3, 441-2; Idem, *al-Fatāwā,* vol. 3, 444-5, 458; Idem, *Minhāj*, vol. 2, 243. Ibn Taymiyya's student, Shams al-Dīn Abū 'Abd Allāh Muḥammad b. Abī Bakr b. Qayyim al-Jawziyya (d. 751/1350-1), *'Aḥkām Ahl al-Dhimma,* ed. Ṣubḥī Ṣāliḥ (Beirut: Dār al-'Ilm li al-Malāyyīn, 1983), vol. 2, 469-70, argued that if the rebels rely on a *ta'wīl* they should not be held liable. But if two groups fight over tribal reasons (*'aṣabiyya*) they should be held liable to each other.

Importantly, Ibn Taymiyya accepts the notion that if they rely on a plausible interpretation or cause, rebels are similar in status to *mujtahids*.[942] For the most part, he also accepts the traditional rules pertaining to the treatment of rebels, and that those who rely on a plausible *ta'wīl* should not be held liable for property or life destroyed during the course of their rebellion.[943] He maintains that even the Khawārij should not be considered unbelievers, and that the laws of rebellion should be extended to them as well.[944] Ibn Taymiyya, however, challenges the traditional discourses on rebellion from a different perspective; his main objection is to the notion of the permissibility of rebellion or the permissibility of fighting rebels in the first place. Ibn Taymiyya contends that there is clear evidence in the scriptural sources that the Khawārij, if they rebelled, must be fought, and that the masses should aid a ruler against the Khawārij. He argues, however, that al-Shāfi'ī and the Kufān jurists erroneously equated between the Khawārij and other rebels, and by doing so, gave support to *fitna*. By equating between the Khawārij and other rebels, these jurists effectively created an obligation upon the masses to support a ruler against all rebels. Ibn Taymiyya argues that these jurists went as far as presuming that any ruler is to be considered the just ruler, and that anyone who rises in an armed insurrection against such a ruler is to be presumed a rebel. Therefore, these jurists created an obligation upon all people to support the presumed just ruler against anyone who might rebel against him. Ibn Taymiyya asserts that this is a form of reprehensible tribalism (*'aṣabiyya*) presumably because the ruler is supported whether he is just or not.[945] According to Ibn

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[942] Ibn Taymiyya, *al-Fatāwā*, vol. 3, 457-8.

[943] Ibn Taymiyya, *Majmū'*, vol. 4, 452; Idem, *al-Fatāwā*, vol. 3, 514-5; Idem, *Minhāj*, vol. 2, 232. Ibn Taymiyya argues that rebels are not held liable because they believed in good faith in the legality of their actions. Idem, *Minhāj*, 246.

[944] Ibn Taymiyya, *Majmū' al-Rasā'il wa al-Masālik* (Beirut: Dār al-Kutub al-'Ilmiyya, 1983), vol. 2, 378-9.

[945] Ibn Taymiyya, *Majmū'*, vol. 4, 440-1, 452; Idem, *al-Fatāwā*, vol. 3, 443; Idem, *Minhāj*, vol. 2, 232. Ibn Taymiyya argues that this is also similar to being blindly loyal to a certain group, teacher or school of thought. All such forms of blind loyalty is reprehensible.

Taymiyya, God did not command fighting rebels, rather God commanded reconciling between the contending parties, and commanded that one abstain from becoming involved in *fitna*. By requiring that people support rulers against rebels, these jurists effectively required people to become involved in reprehensible *fitan*. Ibn Taymiyya concludes that people should not obey rulers if it means disobeying God, and therefore, people should not obey rulers if such rulers command them to fight rebels or become involved in a *fitna*.[946]

Having condemned the idea of blindly supporting rulers against rebels, Ibn Taymiyya goes on to condemn the idea of rebellion itself. He contends that *'aḥkām al-bughā* has incited *fitna* by lending support to the idea of rebellion. Throughout the ages, he argues, many jurists and religious people have risen in armed insurrection, believing in the correctness of their interpretation or cause. These people sought to enjoin the good and forbid the evil or to establish justice, but all they ever achieved was to spread *fitna* and bloodshed. Invariably, they caused more harm than good by rebelling and they realized at the end that their efforts, even if well-intentioned, were entirely misguided.[947] Ibn Taymiyya argues that the reason for this repeated pattern of behavior is shortsightedness, and lack of patience. People, by their very nature, gravitate towards insisting upon demanding their rights and rejecting injustice. Therefore, when a ruler commits injustice and deprives people of their rights, people tend to rebel, but in doing so, they fail to consider the public good, and the widespread corruption that results from such rebellions.[948] In order to demonstrate the point, Ibn Taymiyya engages in lengthy discussions on the early rebellions in Islam, attempting to prove that all such rebellions were misguided and resulted in more harm than good. Among the rebellions or conflicts that he discusses are the following: the war between al-'Amīn and al-Ma'mūn; and the rebellions by Ṭalḥa, al-Zubayr and 'Ā'isha; and al-Ḥusayn b. 'Alī, Ibn al-Zubayr,

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[946] Ibn Taymiyya, *Majmū'*, vol. 4, 442-3.

[947] Ibn Taymiyya, *Minhāj*, vol. 2, 241, 243-4.

[948] Ibid., vol. 2, 244.

Muḥammad and 'Ibrāhīm b. 'Abd 'Allāh, Ibn al-'Ash'ath, Ibn al-Muhallab and 'Abd 'Allāh b. 'Alī, Zayd b. 'Alī; and Ibn Muslim.[949] Ibn Taymiyya's point is that all of these political conflicts resulted in immeasurable evil, and therefore, should not be emulated in any form. Ibn Taymiyya also engages in a lengthy defense of Mu'āwiya and Yazīd insisting that it is not appropriate to curse or condemn either of them. Particularly in the case of Yazīd, Ibn Taymiyya's ultimate justification for refusing to condemn or curse him is that if the door of cursing unjust rulers is opened, it will prove difficult to close.[950] According to Ibn Taymiyya, the best response to unjust rulers is patience.[951]

Ibn Taymiyya's objection to rebellion is functional; it is based on a balance of evils. But he does not seem to be willing to concede that under certain circumstances, a balance-of-evils analysis might support an armed insurrection. According to Ibn Taymiyya, history has proven that armed insurrections never yield positive results. Nonetheless, Ibn Taymiyya does not support the idea of blind obedience to those in power. As noted above, he insists that one should never obey a ruler's sinful command, and should not support rulers against rebels. He advocates non-violent resistance to illegal commands, and seems to accept that in certain circumstances one may use violence in self-defense. In response to the question of whether one may defend oneself in a *fitna*, he simply notes that there is a difference of opinion on the matter.[952] As to whether one should affirmatively enjoin the good and forbid the evil through non-violent means, again Ibn Taymiyya employs a balance-of-evil analysis. He argues that, for example, a *sulṭān* (absolute ruler) may convert to Islam but continue to drink alcohol and commit other sins. One should attempt to prevent such a ruler from committing such sins. But if there is a risk that upon being told to refrain from drinking, the ruler will abandon Islam altogether and become an apostate, then such a ruler should be left alone, and one should not attempt to reform him. Nonetheless, this does not mean that one should obey a ruler's sinful commands.[953] Rather, Ibn Taymiyya argues, Muslims should focus on keeping their own private consciences pure, and promoting incremental non-violent reforms as circumstances might permit. In this context, Ibn Taymiyya argues that there are Muslims who insist on the ideal of a just caliphate and reject anything less. On the other hand, there are those who unequivocally accept kingship, and completely abandon the ideal of a just caliphate. Both sides, Ibn Taymiyya argues, are wrong. One should not completely reject the political reality of kingship, and one should not forget the ideal of the caliphate. Rather, one should work within the prevailing reality, as long as one does not legitimate what is wrong, and one should strive to achieve the ideal through incremental steps.[954]

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[949] Ibn Taymiyya, *Majmū'*, vol. 4, 450-2; Idem, *Minhāj*, vol. 2, 239-243, 245-6.

[950] Ibn Taymiyya, *Majmū'*, vol. 4, 507-8; Idem, *Minhāj*, vol. 2, 253-4; Idem, *al-Fatāwā*, vol. 3, 455.

[951] Ibn Taymiyya, *Majmū'*, vol. 35, 21, vol. 4, 443; Idem, *Minhāj*, vol. 2, 241-2; Idem, *al-Siyāsa*, 139.

[952] Ibn Taymiyya, *al-Siyāsa*, 77.

Ibn Taymiyya does not espouse neutrality towards political conflicts. Rather, he advocates disengagement from all violent political conflicts; Muslims should not support rulers and should not support rebels either. Although he, in principle, affirms the paradigms and rules of conduct of *'aḥkām al-bughā* such as non-liability because of the existence of a *ta'wīl*, and the prohibition against executing rebels, this is not Ibn Taymiyya's main focus. It is likely that he affirms such paradigms and rules of conduct more out of deference to the inherited legal precedents than from conviction. Despite the fact that he is a virulent critic of *'aḥkām al-bughā*, he is unable to entirely abandon the inherited positions of the legal culture which he criticizes. Ibn Taymiyya, himself, did not lead a politically quiet life. He served as a law professor in Damascus on several occasions, but lived most of his life between Damascus and Cairo. He consistently adopted theological and legal positions that got him into considerable trouble with the authorities in Damascus and Egypt. In one incident, he refused to issue a *fatwā* that would have permitted al-Sulṭān al-Nāṣir (r. 693//1293 - 694/1294, 698/1299 - 708/1309, 709/1310 - 741/1341) to seek revenge against, and exterminate some of his political foes, and as a result Ibn Taymiyya was imprisoned. In fact, Ibn Taymiyya was imprisoned several times in Alexandria and Damascus, and he eventually died in prison in Damascus. Nonetheless, he was extremely active in supporting the war efforts against the Mongols and was present, in his capacity as an official preacher, in the victory over the Mongols in Shaghab (699/1299). Importantly, in 704/1305 he took part in the fighting against the Ismā'īlīs and Nuṣayrīs in Jabal Kasrawān in Syria, and throughout his life, made a habit of attacking groups that he considered innovators in religion, such as the Ṣūfīs, Khawārij, Rāfiḍa, Qadariyya, Mu'tazila and 'Ash'ariyya.[955]

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[953] Ibn Taymiyya, *Majmū'*, vol. 35, 21, 32.

[954] Ibid., vol. 35, 27-32.

Ibn Taymiyya's personal history disproves any suspicion that his deconstruction of, or lack of commitment to, *'aḥkām al-bughā* was the result of a desire to appease the political authorities of his age. However, his history does help in contextualizing and understanding Ibn Taymiyya's system of priorities. Ibn Taymiyya was preoccupied with the external threat posed to Islam by the Mongols, and with the internal threat posed by what he considered to be heretical theologies. Confronted by these threats, he insisted upon the imperative of unity among Muslims. But he also insisted upon the ideal of the state as the protector of order and stability, and guarantor of correct religion or orthodoxy. This is evident from Ibn Taymiyya's consistent exhortations that the state must refrain from engaging in battles with political foes, but must relentlessly combat unorthodox groups such as the Khawārij. In his *responsa*, Ibn Taymiyya insists that the Fāṭimids of Egypt, and the Nuṣayriyya, Ismā'īliyya, Qarāmiṭa, Bāṭiniyya, Kharamiyya and al-Muḥrima cannot be considered rebels, but must be fought and treated as heretics.[956] Other than the problem of heretical groups, it is clear from the *responsa* literature that Ibn Taymiyya's time was plagued by a considerable amount of feuding and civil strife between tribes. When asked about infighting between such groups, Ibn Taymiyya does not focus on the technicalities of *'aḥkām al-bughā.* Instead, he consistently emphasizes that all fighting between Muslims, regardless of the reason, is a *fitna*, and is strictly prohibited.[957] In his book, *al-Siyāsa al-Shar'iyya,* he argues that all types of tribal feuding is by definition not an acceptable *ta'wīl*, and hence, does not qualify under *'aḥkām al-bughā.*[958]

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[955] Mohammad Ben Cheneb, "Ibn Taimīya," in *Encyclopedia of Islam*, 1st ed., vol. 3, 421-3; Ibn al-'Imād, *Shadharāt*, vol. 6, 80-6; al-Ziriklī, *al-'A'lām*, vol. 1, 144.

[956] Ibn Taymiyya, *al-Fatāwā*, vol. 3, 487, 513-5. Ibn Taymiyya is asked about two groups which refuse to obey the ruler and constantly fight with each other. These groups do not pray and do not observe the laws of Islam. Furthermore, they take each others' prisoners captive and sell the captives to non-Muslims.

Ibn Taymiyya's system of priorities is also evident in his unequivocal condemnation of banditry and brigandage. Ibn Taymiyya gives the impression that banditry was widely-practiced in Egypt, Syria and Arabia by bedouins, and what he refers to as *fasaqat al-jund* (mercenary or outlaw soldiers). Ibn Taymiyya describes bandits as those who seek to terrorize people and pillage and rape.[959] He insists that the state must fight and destroy such groups. But he does not concede much discretion to the state in dealing with such groups. Therefore, he argues that such groups must be held jointly and severally liable for the acts of their individuals. If a member of the group commits murder, the group must be executed, if a member usurps property, the group must be amputated from opposite ends, and if they raise weapons without killing or usurping property then the ruler has discretion to either imprison or exile them according to what the public interest dictates.[960] Ibn Taymiyya alludes to the political connotations of the crime of banditry by asserting that most often, this crime is committed by soldiers or tribes which resist the authority of the state. Such groups take refuge in the mountains, and form alliances to

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Ibn Taymiyya responds that the state must fight both groups and teach them the laws of Islam, see Ibid., vol. 3, 472-3.

[957] Ibn Taymiyya, *al-Fatāwā*, vol. 3, 442, 460, 463.

[958] Ibn Taymiyya, *al-Siyāsa*, 70. He cites the fighting between the tribes of Qays and Yaman as examples of prohibited tribal feuding. In *al-Fatāwā*, vol. 3, 463, he condemns feuding and vengeance killings.

[959] Ibn Taymiyya, *al-Siyāsa*, 75; Idem, *al-Fatāwā*, vol. 3, 525.

[960] Ibn Taymiyya, *al-Siyāsa*, 70-1.

attack travelers, often between Syria and Iraq, and call this *al-nahīḍa* (which could mean the support, resilience, resistance or rebellion).[961] Although Ibn Taymiyya states that bandits do not fight over religion or politics but simply over material gains,[962] this statement is ambiguous. It could mean that if groups pursue terror-filled means such as those employed by bandits, they are not to be considered rebels. Alternatively, it could mean that if a group has religious or political motives, it is not to be treated under the laws of banditry, even if the group pursues means similar in nature to the means pursued by bandits. It is not clear which of these two meanings Ibn Taymiyya intends but it is likely that he means the former rather than the latter. Ibn Taymiyya is primarily concerned with the impact that stealth and terror-filled means of attack have on society. He emphasizes that the means pursued by bandits have the effect of causing public corruption and spreading insecurity and lawlessness. Furthermore, we have already demonstrated that he is not sufficiently sympathetic to the moral claims of political rebels so that he would strive to protect them regardless of the means pursued. Additionally, he notes that there is support for the view that a political assassin should be treated as a bandit because of the public corruption (*al-fasād al-'āmm*) which such a person creates.[963]

In summary, Ibn Taymiyya opposes rebellion not out of an unreserved fidelity to those in power, but out of fidelity to the ideal of order and stability. Even then, he is unwilling to argue that people should support rulers regardless of the rulers' conduct. For Ibn Taymiyya, all forms of violent conflict between Muslims is reprehensible and forbidden. But this imperative takes second place to the importance of insuring orthodoxy and sound religion. Ibn Taymiyya clearly expects the state to play an active role in fighting heresy, and destroying groups that destabilize society such as bandits. Significantly, he does not hesitate to label soldiers, who might otherwise be helpful to the state, as bandits if their behavior destabilizes society and spreads terror. As far as the law of rebellion is concerned, Ibn Taymiyya is a revisionist, not because he consciously attempted to reform or develop the traditional discourses on the subject. Rather, he is a revisionist because he attempted to deconstruct the field, and stress what he considered its unprincipled and lawless tendencies. According to Ibn Taymiyya the field tends to simultaneously encourage rebellion, and lend support to rulers against rebels regardless of the substantive claims of the rulers or the rebels. The jurists equated between the Khawārij and all other rebels because they did not wish to become entangled in the substantive claims made by specific rebellious groups. Therefore, they argued that any plausible interpretation is sufficient to qualify a group as *bughā*. Ibn Taymiyya found this to be reprehensible because he was more of a moralist, and less of a jurist, than he, perhaps, realized. His system of priorities emphasized correct belief and religion first, then order and stability, and finally the technicalities of the inherited legal discourses. In many ways, Ibn Taymiyya tried to rise above the technicalities of the law of rebellion, and to emphasize the perceived substantive needs of religion and society. It is rather ironic that through constant tribulations, Ibn Taymiyya was the one who repeatedly found himself accused of heresy and incitement against rulers. But it is exactly because Ibn Taymiyya sought to construct paradigms beyond political expediency that made him a problematic political figure. By challenging the legal presumption that rulers, whether just or unjust, should be supported against rebels, he was, in fact, instituting a significant legal change in the discourses on rebellion and taking a thoroughly political position. Importantly, he shared more with the early jurists who constructed the discourses on rebellion than he was willing to admit. The early jurists responded to absolute moral claims of power by rulers by granting rebels a competing moral claim. The discourses on rebellion rendered moral claims to power relative and simply a matter of interpretation (*ta'wīl*). Furthermore, any ruler, just or unjust, was declared bound by the rules limiting the discretion of rulers in dealing with rebels. In other words, the early juridical discourses limited and qualified the support given to rulers against rebels. Ibn Taymiyya might be right in suspecting that *'aḥkām al-bughā* encouraged rebellions, but he is wrong in assuming that the early jurists intended to give rulers unqualified and uncritical support. Like Ibn Taymiyya, the early jurists sought to qualify the support given to rulers but through a different methodology. The early jurist reacted with a belief in the ideal of the technicalities of the law as a restraining element. With the benefit of many centuries past, Ibn Taymiyya sought to rise above the technicalities, and emphasize the substantive ideal of qualified support to rulers. Ultimately, he differed from the jurists he criticized in method and not in purpose.

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[961] Ibid., 71, 75.

[962] Ibid., 75.

[963] Ibid., 74.

Ibn Ṭaymiyya's criticisms were directed at the doctrines and ideas of the inherited discourses on rebellion. His revisionist program was based on a polemical deconstruction of the logic and paradigms of the discourses of the traditional trend. Although Ibn Taymiyya does not acknowledge it, many other jurists, contemporaneous to Ibn Taymiyya, revised the inherited doctrines on rebellion in substantial and significant ways. Nonetheless, unlike Ibn Taymiyya, they did not attempt to deconstruct or criticize the inherited doctrines. Rather, they instituted the revisions subtly, and at times, even claimed historical authenticity in support of such revisions. Often the jurists gave the distinct impression that novel legal doctrines were settled and well-established points of law. If a reader did not trace the historical progression of the discourses, the reader would hardly realize the existence of revisions or developments in the law. Unlike Ibn Taymiyya, the revisionist jurists emphasized the technicalities and details of the law of rebellion, but reformed its doctrines as to offer symbolic and moral resistance to the unjust rulers. As I argue below, besides insisting on a certain minimum standard of behavior in dealing with rebels, these jurists refused to unequivocally condemn rebellion or lend unmitigated support to rulers. This should be understood in the context of the power dynamics taking place between the jurists and the state. By rehabilitating the law of rebellion, they legitimated the moral function of the law and the legal institution which they represented.

In other words, by insisting that the law did not simply support rulers, wrong or right, these jurists legitimated and defended the integrity of the legal discourses.

The Revisionist Discourse

The jurists of the revisionist trend start their analysis by re-affirming the general rule: rulers should be obeyed and rebellion is impermissible. Some jurists specify that whether the ruler is a usurper, just or unjust, he must be obeyed in order for stability and order to be achieved.[964] Many jurists repeat the formula that a ruler cannot be obeyed if it entails disobeying God,[965] and some go on to explain that there is a difference between a sin (*ma'ṣiya*) and hardship, or something reprehensible (*makrūh*). Commanding a sin means ordering something that is clearly and without doubt contrary to the laws of God. *Makrūh*, however, is a command which entails doing something that is reprehensible or disfavored. These jurists note that there is some disagreement as to whether a ruler should be disobeyed if he commands a sin or commands something reprehensible. The majority of the jurists, however, state that as long as the ruler's command does not clearly entail committing an obvious sin, the ruler should be obeyed.[966] Rebellion means refusing to obey the command of the lawful ruler or rising in an insurrection attempting to overthrow and resist such a ruler or his agents. Having established these familiar grounds, the jurists of the revisionist trend go on to reiterate that rebellion, as long as it is based on a plausible interpretation or cause, is not a sin, and that the word *bughā* does not entail blame or censor.[967] They also reiterate that all the *ḥadīth* attributed to the Prophet which condemn or curse rebels only apply to those who rebel without a plausible interpretation or cause. As long as rebels act on good faith and while believing in the justness of their cause, they are not blameworthy or accursed, and the *ḥadīth* of the Prophet does not apply to them.[968] Furthermore, these jurists go on to lay out in great detail the rules pertaining to the proper treatment of rebels. They repeat many of the inherited discussions about how rebels are to be fought and how they are to be treated once the fighting ends. Rebels are not to be held liable for life and property destroyed during the course of their rebellion, and since rebels are not considered iniquitous (*fasaqa*), their adjudications and testimony should be accepted and validated.[969]

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[964] Al-Ṣāwī (d. 1241/1825-6), *Bulgha*, vol. 2, 414; al-Zayla'ī (d. 743/1343), *Tabyīn*, vol. 3, 234; Ibn 'Ābidīn (d. 1252/1836-7), *Ḥāshiyat Radd*, vol. 6, 411, 414; al-Nawawī (d. 676/1277-8), *al-Majmū'*, vol. 19, 190, 198; Idem, *Rawḍat al-Ṭālibīn*, ed. 'Ādil 'Aḥmad 'Abd al-Mawjūd and 'Alī Muḥammad Ma'riḍ (Beirut: Dār al-Kutub al-'Ilmiyya, 1992), vol. 7, 266-7; Shams al-Dīn Muḥammad b. 'Aḥmad al-Anṣārī al-Ramlī (d. 1004/1595-6), *Ghāyat al-Bayān Sharḥ Zubad Ibn Raslān* (Cairo: Maṭba'at Muṣṭafā al-Bābī al-Ḥalabī, n.d.), 405; al-Shirbīnī (d. 972/1569-70), *Mughnī*, vol. 4, 123, 132; al-Anṣārī (d. 925/1519), *Fatḥ*, 155; al-Ramlī (d. 1004/1595-6), *Nihāyat*, vol. 7, 409; Ibn Jamā'a (d. 733/1332-3), *Taḥrīr*, 55, 61-2; al-Jamal, *Ḥāshiya*, vol. 5, 113, 121, adds that a usurper's claim to power is recognized only if the person overthrown by the usurper did not have a better claim to power, i.e. through a proper delegation or contract.

[965] Al-Ṣāwī, *Bulgha*, vol. 2, 414-5; Ibn 'Ābidīn, *Ḥāshiyat Radd*, vol. 6, 414; al-Ramlī, *Ghāya*, 407.

[966] Al-Khirshī (1101/1689-90) *Sharḥ*, vol. 8, 60; al-Dusūqī (1201/1786-7), *Ḥāshiya*, vol. 4, 298; Ibn 'Ābidīn, *Ḥāshiyat Radd*, vol. 6, 416; al-Jamal, *Ḥāshiya*, vol. 5, 114; al-Nawawī, *Sharḥ Ṣaḥīḥ*, vol. 12, 464-5, 468; Ibn Ḥajar al-Haytamī (d. 974/1566-7), *Fatḥ al-Jawwād*, vol. 2, 294-5, also challenges the idea that the Muslim nation needs to be ruled by a single *imām*. He argues that not since the days of the companions has a single ruler ruled over all Muslim territory. See the discussion on *ma'ṣiyya* and the limits of obedience in Muḥammad Zakariyā al-Kāndahlawī, *Awjaz al-Masālik ilā Muwaṭṭa' Mālik* (Beirut: Dār al-Fikr, 1989), vol. 8, 214-5.

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[967] Al-Ṣāwī, *Bulgha*, vol. 2, 414-5; al-Nawawī, *Rawḍat*, vol. 7, 270-1; Ibn Ḥajar al-Haytamī, *Fatḥ al-Jawwād*, vol. 2, 294; al-Shirbīnī, *Mughnī*, vol. 4, 124; al-Anṣārī, *Fatḥ*, 153; al-Ramlī, *Nihāyat*, vol. 7, 402; Sharaf al-Dīn Ismā'īl b. Abī Bakr Ibn al-Muqrī (d. 837/1433), *Kitāb al-Tamshiya bi Sharḥ Irshād al-Ghāwī fī Masālik al-Ḥāwī* (Cairo: Dār al-Hudā, n.d.), vol. 3, 371; Idem, *'Ikhlāṣ al-Nāwī*, ed. 'Abd al-'Azīz 'Aṭiyya Ẓalaṭ (Cairo: Lajnat 'Iḥyā' al-Turāth al-'Islāmī, 1989), vol. 4, 127; Ibn Jamā'a, *Taḥrīr*, 240; al-Jamal, *Ḥāshiya*, vol. 5, 113, 116, adds that what the rebels destroy during the course of their rebellion cannot be described as allowed or not allowed. It is merely a mistake that should be forgiven. See, also, al-Shirbīnī, *Mughnī*, vol. 4, 125.

[968] Ibn al-Humām (d. 681/1282), *Sharḥ Fatḥ*, vol. 6, 97; Ibn 'Ābidīn, *Ḥāshiyat Radd*, vol. 6, 416; al-Nawawī, *Rawḍa*, vol. 7, 271; al-Jamal, *Ḥāshiya*, vol. 5, 113; Shams al-Dīn Muḥammad b. 'Aḥmad al-Anṣārī al-Ramlī, *Fatāwā al-Ramlī*, printed in the margin of Ibn Ḥajar's *al-Fatāwā al-Kubrā al-Fiqhiyya* (Beirut: Dār al-Kutub al-'Ilmiyya, 1983), vol. 4, 19; Idem, *Ghāya*, 405; Idem, *Nihāya*, vol. 7, 402, 403-4; Ibn Ḥajar al-Haytamī, *Fatḥ al-Jawwād*, vol. 2, 294; al-Shirbīnī, *Mughnī*, vol. 4, 124; Ibn al-Muqrī, *Kitāb al-Tamshiya*, vol. 3, 371. See, also, al-Wazīr (d. 840/1436), *al-'Awāṣim*, vol. 8, 12-13, argues that the majority of Sunnī jurists did not consider rebellion against an unjust ruler a sin.

[969] Al-Ṣāwī, *Bulgha*, vol. 2, 415; al-Khirshī, *Sharḥ*, vol. 8, 61; al-Dusūqī, *Ḥāshiya*, vol. 4, 300; al-'Ayīnī, *al-Bināya*, vol. 6, 750-1; al-Nawawī, *al-Majmū'*, vol. 19, 210-11, 214-5; Idem, *Rawḍa*, vol. 7, 273-4; al-Jamal, *Ḥāshiya*, vol. 5, 115; al-Ramlī, *Ghāya*, 406; Idem, *Nihāya*, vol. 7, 403-4; Ibn Ḥajar al-Haytamī, *al-'Irshād*, vol. 2, 296-7; al-Shirbīnī, *Mughnī*, vol. 4, 124; al-'Anṣāri, *Fatḥ*, vol. 5, 153-4; Ibn al-Muqrī, *Kitāb al-Tamshiya*, vol. 3, 372; Ibn Jamā'a, *Taḥrīr*, 241. Several of the above cited jurists also note that the rebels' adjudications should be accepted out of concern for the public interest. Some Ḥanafī jurists continued to hold that the rebels are liable in Hereafter, but not on this earth, for life and property destroyed, for example, see al-'Ayīnī, *al-Bināya*, vol. 6, 747; al-Ṭarsawī, *Tuḥfa*, 131. Other Ḥanafī jurists continued to state that the rebels are iniquitous, for example, see Ibn al-Humām, *Sharḥ Fatḥ*, vol. 6, 100, 102; Ibn 'Ābidīn, *Ḥāshiyat Radd*, vol. 6, 420-1.

Thus far, the discourses of the revisionist trend appear identical to the traditional inherited doctrines. However, these jurists introduce several significant new elements to the discussion. Several jurists, particularly from the Ḥanafī school, assert that not only is there no material distinction between the Khawārij and the *bughā*, but also that, as a matter of principle, *takfīr* (the act of calling a Muslim an unbeliever) must be avoided. They note that *'ahl al-ḥadīth* did, in fact, call the Khawārij unbelievers, but they claim that no one has approved of the position adopted by *'ahl al-ḥadīth*. Typically, these jurists comment that: "While it is true that many sectarians (*ahl al-madhdhāhib*) accuse others of disbelief, the jurists do not do so (*al-fuqahā' lā yukaffirūn*)." They also add that, in this context, "only the opinions of the jurists matter (*lā 'ibrah bi ghayri al-fuqahā'*)."[970] These statements are significant because they are made in the context of discussing the requirement of a *ta'wīl*. The import of these statements is that one may not discount the validity of an interpretation or cause in order to accuse a group of rebels of being unbelievers. Hence, the requirement that the interpretation or cause be plausible becomes minimalist in nature. Even sectarian groups (*mubtadi'a*) may not be accused of disbelief in the context of applying the law of rebellion.[971] Of course, the accusation of disbelief or *takfīr* is a powerful rhetorical device that could be used against rebels; however, the statement that jurists, in the context of the law of rebellion, do not practice *takfīr* is a powerful symbolic counterbalance. Stated in the unequivocal fashion quoted above, it tends to strengthen the idea that rebels may not be accused of being unbelievers.

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[970] Ibn al-Humām, *Sharḥ Fatḥ*, vol. 6, 93-4; Ibn 'Ābidīn, *Ḥāshiyat Radd*, vol. 6, 413; al-'Ayīnī, *al-Bināya*, vol. 6, 735-6, 748; Zayn al-Dīn b. Ibrāhīm b. Muḥammad Ibn Nujaym al-Maṣrī (d. 970/1562), *al-Baḥr al-Rā'iq Sharḥ Kanz al-Daqā'iq*, ed. al-Shaykh Zakariyā 'Umayrāt (Beirut: Dār al-Kutub 'Ilmiyya, 1997), vol. 5, 235. Also see, al-Wazīr, *al-'Awāṣim*, vol. 4, 369, arguing that the Sunnī jurists do not consider the Khawārij unbelievers, and vol. 8, 10-11 arguing the same as to the Mu'tazila.

[971] For instance, see al-Ramlī, *Nihāyat*, vol. 7, 403-4. But some revisionist jurists, however, argued that the Khawārij should be treated as bandits, see, for example, 'Ibn al-Muqrī, *'Ikhlāṣ*, vol. 4, 128; al-Nawawī, *Rawḍat*, vol. 7, 272. But see Ibn Ḥajar al-Haytamī, *al-'Irshād*, vol. 2, 296; al-'Anṣāri, *Fatḥ*, vol. 5, 153 and al-Shirbīnī, *Mughnī*, vol. 4, 124, for a refutation of this view. See, on al-Rawāfiḍ, the *fatwā* in Ibn 'Ābidīn, *al-'Uqūd*, vol. 1, 103-107, arguing that the Rawāfiḍ (Shī'a) are both *bughā* and *kuffār* at the same time.

Nonetheless, the jurists of the revisionist trend go beyond this rhetorical point, and argue that if a group possesses a degree of strength (*shawka*) but does not have an interpretation or cause (*ta'wīl*), the group is not to be held liable for life or property destroyed during the course of their rebellion. If the group commits acts of banditry, the group, which lacks an interpretation or cause, is to be treated as bandits. But if the group rises in rebellion and does not commit acts of banditry, it is not to be held liable even if it lacks a plausible interpretation or cause. The jurists justify this position on the grounds of the public interest in achieving reconciliation and social peace. However, the effect of this ruling is to de-emphasize the importance of a *ta'wīl* because even if a *ta'wīl* is missing, the group might still not be held liable. But the jurists of the revisionist trend do not completely compromise the centrality of the existence of an interpretation or cause. They argue that if a group lacks a plausible interpretation or cause, its testimony and adjudications should not be accepted, and, other than the issue of liability, the group is not to be afforded the treatment given to rebels.[972] Significantly, Mālikī jurists of the revisionist trend go further and argue that if a group rebels against an unjust ruler, it will be presumed to have a plausible interpretation or cause (*al-khārij 'alā ghayr al-'ādil ka al-muta'awwil*). Therefore, if the ruler is deemed unjust, no inquiry should be made into the existence of a plausible interpretation or cause. By definition, if the ruler is unjust, the rebels are deemed to have a plausible interpretation or cause.[973] The effect of these concepts is to reduce the need to make substantive inquiries into the plausibility of the rebel's interpretation or cause. Even rebels who might lack an interpretation or cause are afforded some protection.

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[972] Al-Jamal, *Ḥāshiya*, vol. 5, 116-7; al-Shirbīnī, *Mughnī*, vol. 4, 126; al-Ramlī, *Ghāya*, 406; Idem, *Nihāya*, vol. 7, 405; al-'Anṣārī, *Fatḥ*, vol. 5, 153; Ibn al-Muqrī, *'Ikhlāṣ*, vol. 4, 126, 128; Idem, *Kitāb*, vol. 3, 372-3; Ibn Ḥajar al-Haytamī, *al-'Irshād*, vol. 2, 295; al-Nawawī, *Rawḍa*, vol. 7, 275, 276. But Ibn Jamā'a, *Taḥrīr*, 240, 243, argues that the same analysis applies to rebels who lack a *ta'wīl* or who lack a *shawka*.

[973] Al-Ṣāwī, *Bulgha*, vol. 2, 415; al-Khirshī, *Sharḥ*, vol. 8, 61; al-Dusūqī, *Ḥāshiya*, vol. 4, 300.

Beyond modifications as to the concept of *ta'wīl*, the jurists of the revisionist trend go beyond the traditional paradigms by re-inserting an inquiry into the substantive quality of those in power. This inquiry is not intended to assess the basis for the legitimacy of power, or question whether those in power are legitimate. The majority of jurists had held that power could be attained by *de facto* usurpation.[974] Rather, the substantive inquiry is directed specifically at the issue of rebellion. These discourses reflect what might be called a "moral or evaluative aspect" and a "positive or procedural aspect." The moral or evaluative aspect relates to whether those who commit an insurrection are outlaws in the first place. The moral or evaluative aspect also relates to whether the ruler has a right to fight or resist those who commit an insurrection against him. The positive or procedural aspect relates to whether Muslims should assist the rebels or assist the ruler. It also relates to the treatment of those who commit an insurrection regardless of how they are classified at the moral level.

At the moral or evaluative level, many jurists make a distinction between rebels who, in self-defense, resist the illegal orders of an unjust ruler (sometimes referred to as *'imtinā'*), and those who rise in rebellion seeking to overthrow the ruler (sometimes referred to as *khurūj*). An example of the first (i.e. *'imtinā'*) is when a ruler demands unjust taxes. Upon the refusal of the group to pay, the ruler seeks to exact the taxes by force, and the group defends its property. In this case, the jurists assert, those who resist are not rebels at all. They are entirely within their right.[975] This is to be distinguished from a situation where a group actively seeks to overthrow the ruler and directly assume power. In the first situation, the group seeks only to defend itself and its property from an affirmative duty placed upon it. In the second situation a group is not responding to a specific injustice inflicted upon it, but actively seeking to replace the ruler in power. In the first situation, the group of people resisting an injustice inflicted upon them are not *bughā* because they are acting within their right. On the other hand, those who seek to overthrow the ruler are *bughā* because they are not fighting in self-defense, but rather, over a desire for power. Some jurists add that if the ruler is unjust, it is illegal to seek to overthrow him, but it is also illegal for the ruler to fight the rebels. Consequently, whether the rebels are resisting in self-defense or actively seeking to overthrow the ruler, if the ruler is unjust, it is not lawful for the ruler to fight the insurrection. Other jurists argue that if the rebels are seeking to overthrow the ruler, even if the ruler is unjust, he has a right to resist the rebels.[976] In other words, most of the jurists agree that if the cause of the rebellion is an injustice inflicted upon a particular group, then the ruler does not have the right to fight the rebels. But if the rebellion is a conflict over power, and not a response to an injustice, the jurists disagree on whether an unjust ruler has a right to fight the rebels.

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[974] However, al-Jamal, *Ḥāshiya*, vol. 5, 121, argues that if a ruler came to power through a contract or designation, he cannot be removed by usurpation. Al-Shirbīnī, *Mughnī*, vol. 4, 132, states the same. Al-Ṣāwī, *Bulgha*, vol. 2, 414, argues that a usurper is recognized only when the majority of people obey him. Al-Ramlī, *Ghāya*, 407, states that only a usurper who fulfills the proper conditions will be recognized. But it is not clear to what conditions is he referring. Presumably, he is referring to the condition of *shawka* (sufficient power or strength), see Idem, *Nihāyat*, vol. 7, 409.

[975] Ibn al-Humām, *Sharḥ Fatḥ*, vol. 6, 96; Ibn Nujaym al-Maṣrī, *al-Baḥr*, vol. 5, 235; Ibn 'Ābidīn, *Ḥāshiyat Radd*, vol. 6, 411-12, 416; al-Ramlī, *Nihāya*, vol. 7, 402; al-Ṣāwī, *Bulgha*, vol. 2, 414-5; al-Dusūqī, *Ḥāshiya*, vol. 4, 299; vol. 2, 205. Al-'Ayīnī, *al-Bināya*, vol. 6, 735, argues that if the rebels are resisting an injustice they are not *bughā*. But he asserts that Muslims should not assist the ruler or the rebels. Al-Zayla'ī, *Tabyīn*, vol. 3, 294, argues the same. Al-Ṭarsawī, *Tuḥfa*, 119, 121, 123, 126, argues the same. Also see the discussion in Ibrāhīm b. Muḥammad b. Ibrāhīm al-Ḥalabī (d. 956/1549), *Multaqā al-Abḥur*, ed. Wahba Sulaymān al-'Albānī (Beirut: Mu'assasat al-Risāla, 1989), 379. Al-Ṣāwī, *Bulgha*,

At the procedural or positive level, if the ruler is unjust and a rebellion actively seeks to overthrow the ruler, Muslims should not assist the rebels, but Muslims should not assist the ruler either. Muslims should not assist an unjust ruler against rebels because the possibility exists that it is his injustice that caused the rebellion in the first place. At the same time, Muslims should not assist the rebels because it is unlawful for them to rebel. (*falā yajūzu lahu qitālahum li 'iḥtimāli 'an yakūna khurūjuhum 'alayhi li ẓulmihi wa 'in kāna lā yajūzu lahum al-khurūju 'alayhi*).[977] In the words of the Mālikī jurist al-

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vol. 1, 370; al-Khirshī, *Sharḥ*, vol. 3, 150; al-Dusūqī, *Ḥāshiya*, vol. 2, 205, also argues that if a *dhimmī* leaves the abode of Islam because of an injustice inflicted upon him, this will not constitute an abrogation of his covenant with Muslims.

[976] Al-Ṣāwī, *Bulgha*, vol. 2, 414-5; al-Khirshī, *Sharḥ*, vol. 8, 60; al-Dusūqī, *Ḥāshiya*, vol. 4, 299; Ibn Ḥajar al-'Asqalānī, *Fatḥ al-Bārī*, vol. 14, 309 and see the cites below.

Khirshī, "If the *'imām* is unjust leave him to the demands made upon him. God punishes one oppressor by another, and then destroys the both of them together *(da'hu wa mā yurādu minhu. Yantaqimu 'Allāh min al-ẓālimi bi ẓālimin thumma yantaqimu min kilayhimā.)*"[978] However, in the case of a group that resists in self-defense, Muslims should assist such a group only if doing so will not result in a greater social harm than good.[979]

Some jurists, however, adopt a position similar to the position taken by Ibn Ḥazm, and argue that if a people rebel against a ruler because of his injustice, even if they are seeking to overthrow him, they are not to be considered *bughā*. In other words, these jurists deny the distinction between resisting in self-defense and attempting to overthrow the ruler. In either case, they argue, if the motivating factor for the rebellion is the injustice of the ruler, then the rebellious group is considered just, and the rebellion justifiable.[980] But this, again, means that Muslims should not assist the ruler, and should assist the rebels only if the benefits outweigh the harm. It is important to note that, under this analysis, this

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[977] Al-Ṣāwī, *Bulgha*, vol. 2, 414-5; al-Khirshī, *Sharḥ*, vol. 8, 60; al-Dusūqī, *Ḥāshiya*, vol. 4, 299; Ibn Ḥajar al-'Asqalānī, *Fatḥ al-Bārī*, vol. 14, 309, states that if someone rebels against an unjust ruler, he is excused and it is not permissible to fight the rebel. Al-Zayla'ī, *Tabyīn*, vol. 3, 294, argues that if a group resists in self-defense, Muslims should not assist the ruler or the rebels. But if a group seeks to affirmatively overthrow an unjust ruler, then Muslims should either assist the ruler or remain neutral but should not take part in the rebellion. *Al-Fatāwā al-'Ālamgīriyya (al-Fatāwā al-Hindiyya)*, vol. 2, 284, asserts that if the cause of the rebellion is an injustice inflicted by ruler on the rebels or on someone else, Muslims should not assist the rebels or the ruler. If, however, the rebels are competing for power, Muslims should assist the ruler. Al-Ṭarsawī, *Tuḥfa*, 119-121, 123, 126, argues for a three-way division:
1. If an injustice has been committed against the rebels, Muslims should not assist the ruler or the rebels.
2. If two somewhat equally culpable or meritorious parties fight over power, Muslims should not get involved and should not support either side. 3. If there is a well-established ruler who has enforced stability and order, and a group tries to overthrow him (but the group has not suffered an injustice), Muslims should assist the ruler against the rebels. Al-Qurṭubī, *al-Jāmi'*, vol. 6, 157, reports that *'Ahl al-Ḥadīth* held that a person has a right to self-defense but not against the ruler. The right to self-defense cannot be asserted against an injustice inflicted by the ruler.

[978] Al-Khirshī, *Sharḥ*, vol. 8, 60.

[979] Ibn 'Ābidīn, *Ḥāshiyat Radd*, vol. 6, 416; al-'Ayīnī, *al-Bināya*, vol. 6, 736, reports that (Fakhr al-Dīn) al-Rāzī held that in this case, Muslims have a duty to support the rebels regardless of the consequences. Ibn al-Humām, *Sharḥ Fatḥ*, vol. 6, 96, argues that in this case, Muslims should assist the rebels only if it is clear that an injustice has been committed against such rebels. Ibn Nujaym al-Maṣrī, *al-Baḥr*, vol. 5, 235-6, argues the same, and adds that if it is clear that an injustice was inflicted upon the rebels *or others* Muslims should assist the rebels against the ruler.

[980] Al-Wazīr, *al-'Awāṣim*, vol. 8, 19, claims that the Sunnīs, in general, held that one who rebels against an unjust ruler is not a *bāghī*.

does not necessarily mean that the group committing an insurrection is entitled or has a right to rebel. It only means that if a group rebels and the ruler is unjust, then they, at a moral level, cannot be considered rebels. At the positive or procedural level, whether the jurists distinguished between resisting in self-defense or committing an outright rebellion, and whether the ruler had a right to fight the rebels or not, in all circumstances, the ruler remains bound to afford the treatment of *'aḥkām al-bughā* to those who he fights.

All of the above mentioned specifically relates to whether or not a ruler has a right to fight rebels, and to the moral classification of rebels once a rebellion occurs as a *de facto* matter. It also relates to whether or not Muslims should assist the rebels or the ruler, and what treatment is due to those who rebel. It does not, however, directly address whether rebellion is permitted in the first place. Of course, the notion that a group resisting an injustice inflicted upon it is not breaking the law, implicitly endorses a right to what one might call defensive rebellion. But this, arguably, means that rebellion is permitted only when a ruler attempts to assault or usurp the property of certain people, and, as a result, they resist.[981] It did not address the larger issue of when it is permissible to forcibly remove an unjust ruler. In response to this specific issue, many jurists advocated what is effectively a balancing act. Rebels should balance the chance of success and weigh it against the potential harm that will result from the rebellion. If the potential harm to society is grave, and the chances for success is limited, then rebellion is prohibited. However, if the chance for success is reasonably good, and the harm to society is limited, then rebellion is permitted.[982]

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[981] However, I argue below that distinguishing between defensive and aggressive rebellions is, at a practical level, untenable. This distinction should be appreciated as a symbolic construct.

[982] Ibn 'Ābidīn, *Ḥāshiyat Radd*, vol. 6, 415; al-Dusūqī, *Ḥāshiya*, vol. 4, 299, argues that if a just person rebels seeking to overthrow an unjust ruler, then rebellion becomes permissible and Muslims should assist the just rebel. Al-Wazīr, *al-'Awāṣim*, vol. 8, 75, 165, argues that the Sunnīs, like the Shī'ites, in principle, permitted rebelling against unjust rulers. But, he argues, both Sunnīs and Shī'ites limited the permissibility to occasions when the good outweighs the harm. Al-'Ābī, *Sharḥ*, vol. 6, 529, argues that rebelling and attempting to overthrow a corrupt ruler is permissible only if there is reasonable certainty that the rebellion will succeed. Al-Rāzī, *al-Tafsir*, vol. 28, 109, asserts that it is possible for the ruler to be the *bāghī*. In that case, he may be resisted by proper advice or stronger means as long as a *fitna* does not

The significance of the fact that some jurists effectively permitted rebellion after a balancing act should not be over-estimated. It should not be taken either as an indication of radicalism or activism on the part of these jurists. Advocating outright rebellion runs the risk of undermining the stability of the legal order which ultimately supports the corporate legal culture of the jurists. In many ways, it does not constitute a negotiation between the political and legal orders, but an outright declaration of war by the legal order against the political order. That is why even the jurists who advocated a balancing act hinged their analysis with repeated warnings against the evils of *fitna* and chaos. It is clear that these jurists sought a way to achieve greater justice in the political order, but worried about the untamed zeal of political idealists and opportunists. Therefore, the explicit permission to rebel was given grudgingly and with much reserve. The majority of the jurists of the revisionist trend negotiated, through creative acts, with the political order instead of declaring an open state of war. It is the symbolism of these creative acts, and the subtleties and details of the legal discourses which was most material to the negotiating process.

It had become clear that the original intent behind the invention of *'aḥkām al-bughā*, in which a conciliatory and lenient treatment of rebels was advocated, had become largely ineffective. As argued earlier, a large gap remained between the way the political order dealt with rebels, and the dictates of the law of rebellion.[983] Furthermore, from the writings of Ibn Taymiyya one suspects that both rulers and rebels used the paradigms of *'aḥkām al-bughā* to support their own interests. Rulers cited these paradigms to argue that Muslims must support the ruler against rebels, and rebels cited these paradigms to justify rebellion. Jurists of the traditional trend continued to repeat the inherited doctrine without

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result. Al-Shirbīnī, *Mughnī*, vol. 4, 123, notes that some have argued that if the ruler came to power through usurpation, then it is permissible to rebel against him if he is unjust. But if he came to power through a contract, it is not permissible to rebel against him. Ibn Mufliḥ, *al-Furū'*, vol. 6, 160, reports that al-Nawawī held that an unjust ruler may be removed by force only if the attempt to remove him does not result in a greater harm. See also the discussion on when rebellion is permissible in al-Nawawī, *Sharḥ Ṣaḥīḥ*, vol. 12, 470-1; Kāndahlawī, *Awjaz*, vol. 8, 215; Ibn Ḥajar al-'Asqalānī, *Fatḥ al-Bārī*, vol. 14, 498; al-'Ābī, *Sharḥ*, vol. 6, 554, 563-5.

[983] Al-Zayla'ī, *Tabyīn*, vol. 3, 293, hints at this fact by asserting that this body of law is rarely applied.

substantial change. In doing so, they validated the legitimacy and integrity of this body of law, specifically, and *Sharīʿa*, generally. Jurists of the revisionist trend, however, responded differently. They affirmed the doctrines of *'aḥkām al-bughā*, and continued to demand conciliation and lenient treatment towards rebels. But they also de-emphasized, but did not completely undermine, the centrality of the *ta'wīl*. They argued that *takfīr* (ruling that a Muslim is an infidel) is not appropriate in this context. They also argued that even a group without a plausible *ta'wīl* cannot be held liable for life and property destroyed during the course of rebellion. Some went further and asserted that if the ruler is unjust, the rebels will be presumed to have a valid *ta'wīl*. More importantly, however, the jurists of the revisionist trend argued that if the rebellion is in response to an injustice, then the rebels are not *bughā* at all. This, in effect, constituted an admission that *'aḥkām al-bughā* is ineffective, at the pragmatic administrative level, because ultimately, this law was not going to be applied by rulers. Therefore, the conduct of a group responding to an injustice is de-criminalized or made a non-issue. By declaring such a group not to be *bughā*, the jurists were making a rhetorical, and not a legal, point. It should be remembered that the status of *bughā* is a preferred or special status. Rebels would want to qualify as *bughā* in order to avoid liability for crimes and other possible harsh treatment. The jurists of the revisionist trend did not intend to claim that those who resist injustice are no longer entitled to a preferred status. After all, those who are not resisting an injustice, but seek to overthrow the ruler are declared to be *bughā*. Rather, the jurists argued that the group that resists an injustice has not committed an infraction in the first place, and does not need to qualify for any status at all. At the symbolic and rhetorical level, this meant two things: One, the ruler does not have a right to even fight the rebels. Two, Muslims, at a minimum, should not assist the ruler against the rebels. The power of this largely symbolic point can be appreciated when one considers the inherently subjective and relative standard set by the jurists. It is difficult, if not impossible, to evaluate whether a rebellion is waged to resist an injustice or to overthrow the ruler. Evaluating whether a group is rebelling in response to an affirmative duty placed upon it,or whether a group is aggressively seeking to overthrow the ruler is untenable. The procedural difficulties in making this type of evaluation are insurmountable. Furthermore, it is difficult to imagine that a judge would declare that in a specific case the ruler did not have a right to fight or resist a certain rebellion.

The early response of *'aḥkām al-bughā* was to widen the scope of the application of the law by objectifying the inquiry into rebellion. Whether a ruler is just or unjust, he is bound to afford rebels a certain preferred treatment. All the rebels needed in order to qualify was a degree of strength and a plausible interpretation or cause. The early purposes of the law had become frustrated. The jurists of the revisionist trend responded by affirming the initial purposes, but they also added a subjective inquiry. Who is the real cause of the rebellion? By introducing this inquiry, these jurists retained a symbolic and largely rhetorical power, the power of definition. Theoretically, if the cause of the rebellion is the injustice of the ruler, Muslims are under no obligation to assist the ruler.[984] The act of discoursive negotiation is evident in the fact that these jurists also emphasized the duty of obedience to rulers whether just or not, and emphasized the general impermissibility of rebellion. In other words, the jurists of the revisionist trend did not seek to declare war on the political order, but sought to bargain and negotiate with the political order by further mitigating its moral claims against rebels. They glumly noted that their day and age had become sufficiently corrupt such that it had become very difficult to distinguish a just from an unjust party; everyone fights over worldly affairs.[985] This implied a tacit condemnation of rebellion because it expressed a degree of cynicism about advocates of just causes – people are motivated by material gain and power rather than principle. However, this cynicism is balanced by condemnations of the corruption and injustice of rulers, and assertions that such rulers often oppress people.[986] Concurrently, the jurists declare those who rebel because they suffered an injustice to be just.

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[984] Of course, earlier Shī'ī, and some Sunnī, jurists had argued that Muslims should not assist an unjust ruler fight or persecute rebels. However, the revisionist trend adopted and systematized this position in Sunnī discourses, and developed its symbolic and rhetorical significance.

[985] Al-Ṭarsawī, *Tuḥfa*, 121; al-Khirshī, *Sharḥ*, vol. 8, 60; *al-Fatāwā al-'Ālamgīriyya (al-Fatāwā al-Hindiyya)*, vol. 6, 336; Ibn 'Ābidīn, *Ḥāshiyat Radd*, vol. 6, 411; al-'Ayīnī, *al-Bināya*, vol. 6, 735; al-Zayla'ī, *Tabyīn*, vol. 3, 294. Al-Ṣāwī, *Bulgha*, vol. 2, 414, notes that rebellion is the most destructive offense.

The negotiative aspects of this discourse can be understood only by looking beyond the juridical generalizations and focusing on the details and subtleties. In other words, it is the reservations, exceptions and qualifications to the general principles that are the most telling as to the purposes and objects of the legal discourse.[987] Muslim jurists, in principle, supported those in power, but did so with reservations.[988] The symbolic and negotiative nature of this discourse is further evident in the debates among late revisionist jurists on whether rulers (*sulṭān*) and lords (*al-'umarā'*) can commit the crime of banditry. The bulk of these debates deal with situations in which a warlord, or perhaps landlord, exacts unjust levies (*mukūs*) on people. Although such a person does not commit highway robbery, he does terrorize and prey on the helplessness of people. The question is: is such a person a usurper (*ghāṣib*) or bandit? The problem is aggravated if such a person has a general authorization (*taqrīr*) from the *sulṭān* to collect taxes because if he does possess such an authorization, it becomes very difficult to resist or oppose him. The jurists raise the issue of whether such a person is a usurper or bandit, but do not unequivocally resolve it.[989] However, some jurists specifically state that a *sulṭān* who exacts unjust taxes is a usurper and not a bandit. Their proffered rationale for this position is most interesting.

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[986] For instance, see al-Ṭarsawī, *Tuḥfa*, 121; al-Khirshī, *Sharḥ*, vol. 8, 60; *al-Fatāwā al-'Ālamgīriyya (al-Fatāwā al-Hindiyya)*, vol. 6, 336.

[987] Al-Wazīr, *al-'Awāṣim*, vol. 8, 75, in his typically insightful remarks, notes that those examining the general statements of Sunnī jurists will not gain a correct understanding of their purposes and intentions. By particularizing their general statements, Sunnī jurists did not give unjust rulers unqualified support (*wa 'in ẓanna dhālika man lam yabḥath min ẓawāhiri ba'ḍi 'iṭlāqihim fa-qad naṣṣū 'alā bayāni murādihim wa khaṣṣū 'umūma 'alfāẓihim*).

[988] This fact is acknowledged in Ibid., vol. 8, 172-174, who, in part, argues that Sunnī jurists did not accept the authority of unjust rulers by choice (*'ikhtiyār*), but by necessity (*'iḍṭirār*). Al-Wazīr states: "*Wa man lam yufarriqu bayna ḥālay al-'ikhtiyār wa al-'iḍṭirār fa-qad jahila al-ma'qūl wa al-manqūl.*"

[989] Al-Ṣāwī, *Bulgha*, vol. 2, 435; al-Khirshī, *Sharḥ*, vol. 8, 104; al-Dusūqī, *Ḥāshiya*, vol. 4, 348; Ibn 'Ābidīn, *al-'Uqūd*, vol. 2, 283. On the issue of unjust taxes, see Abou El Fadl, "Tax Farming," 22-3.

They argue that a *sulṭān* is not a bandit because it is possible to seek the aid of the jurists (*'ulamā'*) against him. The jurists can and should restrain him by offering him proper advice.[990] But the implication of this argument is that if a *sulṭān* ignores the jurists, and refuses to yield to their advice, then he may be considered a bandit. The jurists also add that it is illegal for anyone to assist the ruler or his agents in collecting unjust taxes.[991]

Of course, it is highly unlikely that jurists would declare a ruler to be a bandit.[992] Nonetheless, the discourse is part of the jurists' symbolic arsenal in dealing with those in power. It is not clear what exact role the symbolism constructed by the revisionist trend played in Islamic social or political history. This is an issue that needs a more exhaustive study. However, it is clear that the jurists, themselves, were concerned about the practical implications of their discourses. They were interested in who and what their legal discourses supported or encouraged. For instance, several jurists noted that the discourses on rebellion should not be understood, at their specific age, to excuse the behavior of bedouins, mercenary soldiers and groups of brigandage such as the *mansar*. They insisted that such groups terrorize the wayfarer and commit acts of banditry, and thus, should be treated as bandits. These jurists were sufficiently concerned about the practical implications of their discourses, and they wished to insure that such discourses would not lend support to certain groups perceived as violent and lawless. Importantly, these jurists stress that groups, such as the *mansar*, are motivated only by material gain, and not by political ends.[993] Therefore, they are denied the status of *bughā*, not necessarily because of their particularly indiscriminate or violent means but because, in the estimate of the jurists, these groups were committing simple acts of banditry and not rebellion.

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[990] Al-Khirshī, *Sharḥ*, vol. 8, 104; al-Dusūqī, *Ḥāshiya*, vol. 4, 348. The authors also state that *jabābirati 'umarā'i miṣr* or *ẓalamati miṣr* are bandits. Also see al-Ja'lī, *Sirāj*, vol. 2, 228.

[991] For a more complete discussion on aiding unjust taxes, see Abou El Fadl, "Tax Farming," 22-23, 26 and the cites contained therein.

[992] According to some, it is possible to declare that a ruler is a *bāghī*, see al-Rāzī, *al-Tafsir*, vol. 28, 109.

[993] Al-Jamal, *Ḥāshiya*, vol. 5, 117, 153; al-Ramlī, *Nihāya*, vol. 7, 405, vol. 8, 4; al-Ṣāwī, *Bulgha*, vol. 2, 435, states that groups of his time that rape women in Egypt are bandits.

It is not clear whether, according to the jurists of the revisionist trends, it is the means or the ends that distinguish a rebel from a bandit. If it is the means then, even if a group has a plausible interpretation or cause, if such a group commits indiscriminate acts of terror or slaughter, the group will be treated as bandits. In other words, by definition, the commission of certain acts will result in a group being dealt with as bandits. However, if it is the ends that are material, then regardless of the means pursued, a group that otherwise qualifies for the status of rebels will not be treated as bandits. To put the issue differently: What if a group of rebels abduct and murder, or attack the unsuspecting at their homes or otherwise terrorize people? The jurists of the revisionist trend are divided on this issue. Some specifically state that if rebels terrorize the wayfarer or commit certain crimes such as rape, they are no longer to be treated as rebels but must be treated as bandits.[994] Other jurists, however, assert that if the primary motivation of a group of rebels is not to spread terror but is to propagate a rebellion, then they cannot be treated as bandits. In other words, even if the means pursued by rebels resemble acts of banditry as long as the rebels are motivated by an interpretation or cause, such rebels shall not be treated as bandits.[995] Still, another group of jurists adopted a position similar to the approach taken by the traditional trend. They argued that if acts of banditry are motivated by enmity or a contest over power and government, the offenders are not to be treated as bandits but are to be held liable for their crimes under the regular criminal laws.[996]

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[994] Al-Ramlī, *Ghāya*, 405; Idem, *Nihāya*, vol. 7, 403; Ibn Ḥajar al-Haytamī, *Fatḥ al-Jawwād*, vol. 2, 296; al-Jamal, *Ḥāshiya*, vol. 5, 115; Ibn al-Muqrī, *'Ikhlāṣ*, vol. 4, 128. Ibn 'Ābidīn, *Ḥāshiyat Radd*, vol. 7, 188, does not deal with the issue directly, but asserts financial gain is not a necessary element in the crime of banditry. An intent to terrorize, however, is a sufficient element. Ibn Ḥajar al-Haytamī, *Fatḥ al-Jawwād*, vol. 2, 314, asserts that if the people of one village attack another, killing and robbing them, the attackers are bandits. Ibn al-Muqrī, *Kitāb*, vol. 3, 429, asserts the same.

[995] Al-Shirbīnī, *Mughnī*, vol. 4, 124, also implies that it is the motivation of the actor which distinguishes rebellion from banditry; al-'Anṣāri, *Fatḥ*, vol. 5, 153; al-Khirshī, *Sharḥ*, vol. 8, 103, states that those who commit acts of banditry but do so because of a contest over government are not bandits.

Importantly, however, many revisionist jurists, mostly Shāfi'ī, accepted the same reform adopted by several jurists from the traditional trend. As discussed earlier, it had become well-established in the discourses on rebellion that rebels and loyalists are liable for any life or property destroyed before or after the rebellion.[997] However, several revisionist jurists adopted a limitation which relates to the way the rebellion, itself, is conducted.[998] They argued that groups that qualify for the status of *bughā* will not be held liable for life and property destroyed in the course of rebellion only if such destruction was necessarily related to the rebellion (*ḍarūratal-ḥarb*). Therefore, if the acts committed were unrelated to the ends of the rebellion, such acts are not protected.[999] Hence, rape, for example, is not protected because it is not directly related to the act of rebellion.[1000] Most jurists applied the same restriction to loyalist forces as well. Pursuant to this position, loyalists are not liable for life or property destroyed only if their acts were necessarily related to the goal of resisting a rebellion. If the behavior of the loyalists was *ultra vires*, or not necessarily related to the specific goal of defeating the rebellion, then the loyalists will be held liable for such excesses.[1001] Therefore, wanton or vengeful destruction of property

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[996] Al-Nawawī, *Rawḍa*, vol. 7, 364-5, argues that the material issue is the helplessness of the victims. He argues that if a group of mercenary soldiers (*'askar*) raid a helpless village, then the soldiers are bandits. But if the village is not helpless, either because of an internal power or external assistance, the soldiers are plunderous looters (dealth with as theives) (*muntahibūn*). Al-Ṣāwī, *Bulgha*, vol. 2, 435-6, mentions rape, killing by stealth, using a drug to murder or rob someone or armed robbery as crimes of banditry. Al-Dusūqī, *Ḥāshiya*, vol. 4, 348-9, lists the same. Arguably, if the motivation for these crimes is rancor, enmity or power, they are considered regular crimes and not brigandage. It is not clear whether rape is treated as a regular crime even if committed because of rancor, enmity or power.

[997] Although some jurists had held that the loyalists are not liable for property destroyed before the commencement of the rebellion, if such destruction was necessary to weaken the rebels. See, for instance, al-Nawawī, *Rawḍa*, vol. 7, 275, citing the opinion of al-Māwardī.

[998] As discussed earlier, this limitation had also been adopted by some jurists from the traditional trend.

[999] Ibn Jamā'a, *Taḥrir*, 246; al-Nawawī, *Rawḍa*, vol. 7, 276; Ibn Ḥajar al-Haytamī, *Fatḥ al-Jawwād*, vol. 2, 295, 297; al-Jamal, *Ḥāshiya*, vol. 5, 116-7; al-Shirbīnī, *Mughnī*, vol. 4, 125; al-'Anṣāri, *Fatḥ*, vol. 5, 153; al-Ramlī, *Nihāyat*, vol. 7, 405.

[1000] Al-Shirbīnī, *Mughnī*, vol. 4, 126; al-Nawawī, *Rawḍa*, vol. 7, 276.

[1001] Al-Jamal, *Ḥāshiya*, vol. 5, 116-7; Ibn Ḥajar al-Haytamī, *Fatḥ al-Jawwād*, vol. 2, 297; al-Shirbīnī, *Mughnī*, vol. 4, 125.

would be held liable.[1002] Of course, whether something is necessarily related to the propagation or the resisting of a rebellion is a vague standard. But it indicates a desire to limit the range of acts that fall under the protection of *'aḥkām al-bughā*. It indicates a real concern with the pragmatic consequences that might result from the discourses of the jurists.[1003] At the same time, it confirms the symbolic and negotiative nature of these discourses because it is the jurists who would decide what is necessarily related or unrelated to a rebellion.

The jurists of the revisionist trend, like the jurists of the traditionalist trend, inherited the doctrines of rebellion. These discourses had become firmly established by the 6th/12th century in the Sunnī juristic culture, and even jurists such as Ibn Taymiyya who criticized the inherited legacy could not abandon its paradigms or specific regulations. Both of the revisionist and traditionalist jurists accepted and repeated the formulas of inherited discourses on rebellion. Importantly, both trends developed some aspects of the discourses as well. The traditionalists focused on the regulatory aspects, and therefore, emphasized the distinction between rebellion and banditry. They focused on the particular acts that would or would not be protected under the law of rebellion. But this betrayed a certain fidelity to the integrity and systematization of the juristic discourses themselves. It is doubtful that the traditionalists had any allusions about these discourses being applied as positive law, and it is also doubtful that the jurists thought that the political reality would honor the subtle distinctions of the juristic discourse. To the extent that the traditionalists engaged and negotiated with the political system, they did so by emphasizing the duty of obedience, and reiterating the inherited discourses. One cannot dismiss this as irrelevant because, after all, it did legitimate and affirm the validity and integrity of the legal culture. However, the response of the traditionalist is not as creative or negotiative as the response of the revisionists.

[1002] Al-Ramlī, *Nihāyat*, vol. 7, 405.

[1003] The concern with the pragmatic consequences of their discourse is also evident in the discussions on the requirement of *shawka*. The jurists often state that a *shawka* must exist, otherwise every person or isolated individuals will invent an interpretation or cause. Such individuals will then rebel and claim that they are entitled to the benefits of *'aḥkām al-bughā*. If this is allowed to take place, disorder and anarchy will prevail. For example, see al-Shirbīnī, *Mughnī*, vol. 4, 126; Ibn Muqrī, *'Ikhlāṣ*, vol. 4, 126; Idem, *Kitāb*, vol. 3, 371; al-Ramlī, *Nihāyat*, vol. 7, 405.

Responding to the same reality that confronted the traditionalists, the revisionists focused on the symbolic aspects of the discourses. The revisionists did reiterate all the technical regulatory aspects of the inherited discourses, but their emphasis was on re-introducing subjective ideological elements into the inquiry. They distinguished between rebels who are responding to an injustice and those who are attempting to overthrow the ruler. They also bolstered the notion that a ruler might not be entitled to the support of Muslims against his opponents. Furthermore, under certain circumstances, if a ruler is not a bandit, he could be a criminal usurper. Ultimately, both revisionists and traditionalists did not simply respond to the internal logic of the legal culture, but they also responded to the political and social implications of their discourses. The traditionalists responded by somewhat undercutting the tendency of the discourses to encourage or support rebellion. But they did not entirely abandon the ideals constructed by the discourses on rebellion. The revisionist response was to bolster the critical content of the discourses. Importantly, however, one cannot describe either the traditionalist or revisionist trends as quietist or activist. Rather, they were both technical and symbolic, pragmatic and idealistic. Most of all, they were thoroughly complex and legalistic.

From a sociological perspective, it is difficult to establish how the revisionist approach began. It is also difficult to ascertain why a particular jurist adopted the revisionist approach while another adopted the traditionalist. The jurists of the revisionist trend came from diverse backgrounds and vocations. Most served as law professors, judges or administrators. Their dynamics with those in power seem to be multi-faceted and varied. The Ḥanafī jurist Badr al-Dīn al-'Aynī (d. 855/1451), for example, served in various teaching and administrative positions in Egypt. He was also fired from several official positions and suffered persecution as well. Eventually, he developed a close relationship to the Mamlūk ruler Abū al-Naṣr Barsbay (r. 825/1422 - 841/1438) and was appointed the chief Ḥanafī judge of Egypt.[1004] Someone like the Shāfi'ī Abū Zakariyā al-'Anṣārī (d. 926/1520) reluctantly accepted the position of the Chief Judge of Egypt, but was later removed when he criticized the injustices of Qāyit Bay Sayf al-Dīn (r. 872/1468 - 901/1496).[1005] On the other hand, the Shāfi'ī Ibn al-Muqrī (d. 837/1433) who lived and died in Yemen, was mostly a teacher. However, he reportedly coveted a judicial position but was never appointed.[1006] One notices, however, that a large number of the revisionist jurists came from Egypt, and thus, one cannot exclude the possibility of the emergence of a localized juristic culture which might have then spread to other localities.[1007] However, a more exhaustive study of the lives and socio-political dynamics of each jurist and his circumstances might yield greater insight into the arisal of the revisionist trend, and might be able to correlate the collective experiences of each trend and its adopted positions.

[1004] Ibn al-'Imād, *Shadharāt*, vol. 7, 286; al-Ziriklī, *al-'A'lām*, vol. 7, 163.

[1005] Al-Ziriklī, *al-'A'lām*, vol. 3, 46.

[1006] Ibn al-'Imād, *Shadharāt*, vol. 7, 220-1. Reportedly, Ibn al-Muqrī was also appointed a governor, see al-Ziriklī, *al-'A'lām*, vol. 1, 310-1.

[1007] For example, the Ḥanafī, al-Zayla'ī, taught and died in Egypt, see al-Ziriklī, *al-'A'lām*, vol. 4, 210; Ibn Ḥajar al-Haytamī studied in Egypt but died in Mecca, see Ibid., vol. 1, 234; the Shāfi'ī Shams al-Dīn al-Ramlī taught and died in Egypt, see Ibid., vol. 6, 7; the Mālikī al-'Adawī lived and died in Egypt, Ibid., vol. 4, 260; the Mālikī al-Dusūqī lived and died in Egypt, see Ibid., vol. 6, 17; the Mālikī al-Ṣāwī lived in Egypt but died in Medina, see Ibid., vol. 1, 246.

CHAPTER 6

THE DEVELOPED NON-SUNNĪ POSITIONS

The main focus of this chapter will be on the 'Imāmī Shī'ī discourses on rebellion. However, for the sake of comprehensiveness we will also comment on the Zaydī and 'Ibāḍī positions. Our purpose is to provide an overview of the treatment of the subject in these schools of thought, and draw comparisons to the Sunnī tradition. The 'Ibāḍīs were the more moderate descendants of the Khawārij, although the history of the sect traces back to the first century of Islām. The Zaydiyya is a Shī'ī sect which is distinguished from the Ja'farīs (later, the 'Imāmī Shī'ites), partly by its recognition of Zayd b. 'Alī who led a rebellion against the 'Umayyads in 122/740. Both Zaydīs and 'Ibāḍīs had been involved in a series of rebellions throughout Islamic history, but they also succeeded in establishing independent states.[1007] Particularly in the case of the 'Ibāḍīs, but certainly for the Zaydīs as well, issues such as who is a rebel, when is rebellion permitted, and how should opponents be treated are integral to the theology of the sect. Therefore, it would be very useful to study the theology of the sects in conjunction with the doctrines of rebellion from the point of view of a historical progression. However, this would be outside the scope of this study. We are interested in examining the extent to which Sunnī symbolism and juristic categorizations are similar or different to the discourses of these sects. As argued below, at a minimum, the developed doctrines of the 'Imāmīs, Zaydīs and 'Ibāḍīs are similar in several important respects to Sunnī doctrines, which is further evidence of the impact of the inherited legal culture.

[1007] On the Zaydīs, see Gibb and Kramers, *Shorter Encyclopedia of Islam*, 651-3; al-Shahrastānī, *al-Milal wa al-Niḥal*, vol. 1, 179-189; al-Baghdādī, *al-Farq*, 16. On the 'Ibāḍīs, see Gibb and Kramers, *Shorter Encyclopedia of Islam*, 143-5; al-Shahrastānī, *al-Milal wa al-Niḥal*, vol. 1, 156-9; al-Baghdādī, *al-Farq*, 70.

The 'Imāmī Shī'ite School

As argued earlier, the 'Imāmī approach to the issue of rebellion was for the most part ideological. It tended to focus on rebellion in a hypothetical sense -- those who will rebel against the true, awaited *'imām* when such a ruler appears. Therefore, several sources emphasized that those who disobey the true ruler are unbelievers, and even if they are not treated as such on this earth, they will be considered unbelievers in the Hereafter. The concept of rebellion was focused upon disobedience to the infallible *'imām* when one exists. In the meanwhile, armed rebellion against illegitimate rulers was outlawed because it was perceived as ineffective and harmful, but 'Imāmī jurists also prohibited assisting unjust rulers against rebels. Nonetheless, by limiting their discourses to the problem of disobeying the infallible ruler, 'Imāmī doctrines continued to be of limited applicability. The rules of conduct dictating how rebels should be treated applied only if an infallible ruler exists. However, these discourses played a powerful symbolic role since they implied that rebels against any ruler, in the absence of the *'imām*, are not *bughā* at all. Nevertheless, because of their futuristic and hypothetical quality, the power of this symbolism is somewhat compromised. Starting probably from the 5th/11th century and especially after the 6th/12th century, 'Imāmī jurists, particularly from Iraq, used the expression "a just ruler" (*'imām 'ādil*) instead of "the just ruler" (*al-'imām al-'ādil*) connoting a shift from the idea of the infallible, awaited ruler to an acceptance of the *de facto* temporary authority of a just authority.[1008]

[1008] On the ambiguity of the term "just ruler" in 'Imāmī discourses and the development of term, see Abdulaziz Sachedina, *The Just Ruler in Shi'ite Islam* (Oxford: Oxford University Press, 1988), 100-5. On 'Imāmī political thought and attitude towards authority, see Lambton, *State and Government*, 219-241; Momen, *An Introduction to Shī'ī*, 191-3. On 'Imāmī views on *jihād* in the absence of the *'imām*, see Etan Kohlberg, "The Development of the 'Imāmī Shī'ī Doctrine of Jihād," *Zeitschrift der Deutschen Morgenlandischen Gesellschaft* 126 (1976): 64-86. Kohlberg focuses on the theological connotations of

Several late 'Imāmī jurists such as Shams al-Dīn al-'Āmilī (d. 786/1384) and Muḥammad Bāqir al-Najafī (d. 1266/1850) continued to define *baghy* as an act of rebellion against the awaited, infallible ruler. Accordingly, in contrast to Sunnī views, they insisted that the word *baghy* does connote blame (*'ism dhamm*), and that the *bughā* cannot be considered equal in status to jurists who exercise an independent opinion on a matter (*mujtahidūn*).[1009] Proclaiming the error of Sunnī views, 'Abd 'Allāh al-Suyūrī (d. 826/1422) argues that since the ruler is infallible, the *bughā* should be considered unbelievers or, at a minimum, hypocrites (*munāfiqūn*).[1010] Furthermore, according to some jurists such as al-Najafī, the primary reason for the restrictions on the conduct of warfare against rebels was for the benefit of the Shī'a. 'Alī knew that his party would ultimately be oppressed and persecuted and he wanted to set a precedent that would protect the Shī'a. By not slaughtering or taking his opponents captive, Sunnīs would feel obligated to follow his example when dealing with the Shī'a. Hence, 'Alī's conduct did not arise out of binding principle, but was a utilitarian necessity produced by the need for dissimulation (*taqiyya*). However, when the infallible ruler (*al-Qā'im*) appears, dissimulation is no longer needed. The *Qā'im* would not be bound by 'Alī's precedent, and may dispose of his opponents in whichever way he deems fit at the time.[1011] From this perspective, the discourse on the *bughā* plays a limited symbolic role. The rules of conduct

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the debates on the *bughā*. He seems to assume that the debates on *bughā* are relevant only to the status of those who rebelled against 'Alī.

[1009] Al-Najafī, *Jawāhir al-Kalām*, vol. 21, 322-3; Shams al-Dīn Muḥammad b. Jamāl al-Dīn al-Makkī al-'Āmilī, *al-Lum'a al-Dimashqiyya*, ed. al-Sayyid Muḥammad Kalantar (Najaf: Maṭba'at al-'Ādāb, n.d.), vol. 2, 407.

[1010] Al-Suyūrī, *Kanz*, vol. 1, 386-8. The author also argues that the Qur'ānic verse on *baghy* does not, as is often assumed by jurists, refer to rebels. Rather, it refers to situations where two Muslim parties quarrel. The Qur'ānic verses that address hypocrites and unbelievers are the ones more relevant to rebellion.

[1011] Al-Najafī, *Jawāhir al-Kalām*, vol. 21, 335-8. The author argues that the Qā'im may slaughter or take his opponents captive because the Qā'im knows that his Shī'a will not be defeated after him. He adds that in the period before the appearance of the Qā'im (*zaman al-hudna*), opponents are treated as Muslims, but after his appearance, opponents will be treated as unbelievers. The author concedes that 'Alī did not call his opponents unbelievers, but he seems to argue that 'Alī did so only out of the need for dissimulation. See also al-'Āmilī, *Wasā'il*, vol. 11, 56-7, 59. However, al-'Āmilī, *al-Lum'a*, vol. 2, 408-9, seems to disagree with the idea that 'Alī's conduct is not binding on all.

are designed to obligate and embarrass Sunnīs dealing with Shī'ī opponents, but the Qā'im ultimately has the discretion not to follow the rules. Ironically, the *bughā* are defined as those who rebel against the just ruler. This creates a definite tension in the discourses. On the one hand, only those who rebel against the just ruler are the *bughā*. On the other hand, the opponents of the Shi'ites are bound by *'aḥkām al-bughā* in dealing with Shī'ites who, in the final analysis, are not *bughā* at all, but rather, are the just party.[1012] This creates a question as to the relevance of *'aḥkām al-bughā*. If, in the final analysis, the just ruler is not bound by *'aḥkām al-bughā*, arguably, the rules of conduct do not yield a religiously binding imperative.[1013] These rules of conduct exist for the utilitarian purpose of protecting the Shī'a, a group which ultimately cannot be described as the *bughā*. Nonetheless, despite the ambiguity, the essential point of these jurists was that those who rebel against illegitimate rulers cannot be considered outlaws, and at the same time, the benefit of 'Alī's conduct was claimed for the protection of the Shī'a.

Since at least the 5th/11th century, a large number of 'Imāmī jurists did not define *baghy* as an act of rebellion against the just ruler but against a just ruler (*man kharaja 'alā 'imāmin 'ādil*).[1014] Therefore, if a group refuses to obey or attempts to overthrow a just ruler while relying on an interpretation or cause, they are the *bughā*. Importantly, many of these jurists avoid stating that the *bughā* are unbelievers.[1015] The *bughā* are not fought until they pose an imminent threat of an armed insurrection, and when they are fought, the wounded, captive and fugitive are not dispatched unless the rebels have reinforcements (*fi'a*). Rebel prisoners are released once the danger from the rebellion subsides. The personal property of the rebels may not be confiscated, but there is disagreement as to the fate of the rebels' horses and weapons. However, 'Imāmī sources insist that the rebels, unlike the loyalists, are in fact liable for life and property destroyed during the course of the rebellion.[1016]

[1012] For instance, al-Najafī, *Jawāhir al-Kalām*, vol. 21, 332, asserts that al-Shāfi'ī admitted that Sunnīs learned *'aḥkām al-bughā* only from 'Alī. Also see al-Suyūrī, *Kanz*, vol. 1, 386. This ambiguity is also reflected in the doctrine that 'Alī was the one who had a *ta'wil*, and Mu'āwiya, as the *bāghi*, lacked a reasonable *ta'wīl*. See al-'Āmilī, *Wasā'il*, vol. 11, 17; al-Kāshānī, *Tafsīr*, vol. 5, 50. Al-Najafī, *Jawāhir al-Kalām*, vol. 21, 333-4, argues that there is no evidence that the rebels must have a *ta'wīl*. At most, the rebels must not have a well-founded legitimate grievance because if they do, the grievance should be redressed. Nonetheless, by definition, the rebels cannot be considered to have a valid interpretation.

The above points add ambiguity and confusion to the field. In the discourses on rebellion, rebels are the ones who are presumed to need an interpretation. This interpretation distinguishes rebels from common criminals or bandits. The argument that 'Alī is the one who had an interpretation, while Mu'āwiya did not, furthers a rhetorical point, but does not aid the legal distinction between rebels and others.

[1013] As discussed below, post 5th/11th century jurists argued that there could exist non-infallible just ruler. Such a ruler would be bound by the law of rebellion.

[1014] Al-Rāwandī (d. 573/1177), *Fiqh*, vol. 1, 363-4; Abū Ṭālib Muḥammad b. al-Ḥasan b. Yūsuf b. al-Muṭahhar Fakhr al-Muḥaqqiqīn al-Ḥillī (d. 771/1369), *'Īḍāḥ al-Fawā'id fī Sharḥ Ishkālāt al-Qawā'id*, (Qum: Mu'assasat 'Ismā'īliyān n.d.), vol. 1, 396; Abū al-Qāsim Najm al-Dīn Ja'far b. al-Ḥasan al-Muḥaqqiq al-Ḥillī (d. 676/1277), *Sharā'i' al-Islām fī Masā'il al-Ḥalāl wa al-Ḥarām*, ed. 'Abd al-Ḥusayn Muḥammad 'Alī (Beirut: Dār al-'Aḍwā', n.d.), vol. 2, 336; 'Imād al-Dīn Abū Ja'far Muḥammad b. 'Alī b. Ḥamza al-Ṭūsī (Ibn Ḥamza) (d. after 566/1171), *al-Wasīla 'ilā Nayl al-Faḍīla*, in *Mawsū'at Silsilat al-*

The expression "a just ruler" is vague, but it connotes a significant shift in the discourse. The expression is broad enough to apply to various structures of authority that could exist before the appearance of the Qā'im.[1017] Hence, at a symbolic level, the 'Imāmī discourses on rebellion register a powerful point. A just ruler does have the right to resist rebels, but must follow the precedent set by 'Alī. However, those who rebel against an

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Yanābī', vol. 9, 162; Abū Manṣūr Muḥammad b. Idrīs al-'Ijlī al-Ḥillī (d. 598/1201), *al-Sarā'ir al-Ḥāwī li Taḥrīr al-Fatāwī*, in Ibid., vol. 9, 183.

[1015] For instance, see the following sources: al-Rāwandī, *Fiqh*, vol. 1, 363-4; al-Ḥillī, *'Īḍāḥ*, vol. 1, 396-7; al-Muḥaqqiq al-Ḥillī, *Sharā'i'*, vol. 2, 336-8; al-Kāshānī, *Tafsīr*, vol. 5, 50-1. Furthermore, these sources do not mention that the Qā'im is not bound by the rules of conduct in the field of rebellion.

[1016] Al-Ḥillī, *'Īḍāḥ*, vol. 1, 396-7; al-Muḥaqqiq al-Ḥillī, *Sharā'i'*, vol. 2, 336-8; Jamāl al-Dīn Abū al-'Abbās 'Aḥmad b. Muḥammad b. Fahd al-Ḥillī (d. 841/1437), *al-Muhadhdhab al-Bāri' fī Sharḥ al-Mukhtaṣar al-Nāfi'*, ed. Mujtabā al-'Irāqī (Qum: Mu'assasat al-Nashr al-Islāmī, 1407 AH), vol. 2, 300-1; Ḥamza b. 'Alī b. Zuhra al-Ḥusaynī al-Ḥalabī (d. 585/1189), *Ghunyat al-Nuzū' 'Ilā 'Ilmay al-'Uṣūl wa al-Furu'*, in *Mawsū'at Silsilat al-Yanābī'*, vol. 9, 151-3; Ibn Ḥamza, *al-Wasīla*, in Ibid., vol. 9, 164; al-Ḥillī, *al-Sarā'ir*, in Ibid., vol. 9, 183-6; 'Alā' al-Dīn Abū al-Ḥasan b. Abī al-Faḍl b. Abī al-Majd al-Ḥalabī (d. late 5th/11th century), *Ishārat al-Sabaq ilā Ma'rifat al-Ḥaqq*, in Ibid., vol. 9, 190, 196; Abū Zakariyyā Yaḥyā b. al-Ḥasan b. Sa'īd al-Hudhalī (d. 689/1290), *al-Jāmi' li al-Sharā'i'*, in Ibid., vol. 9, 238; Jamāl al-Dīn Abū Manṣūr al-Ḥasan b. Sadīd al-Dīn Yūsuf b. Zayn al-Dīn 'Alī b. Muḥammad b. al-Muṭahhar al-Ḥillī (726/1325), *Qawā'id al-Aḥkām fī Masā'il al-Ḥalāl wa al-Ḥarām*, in Ibid., vol. 9, 267-8. See also, Muḥammad Jawād Mughniyya, *Fiqh al-'Imām Ja'far al-Ṣādiq* (Qum: Intishārāt Quds Muḥammadī, n.d.), vol. 2, 279-80; al-'Amīnī, *al-Ghadīr*, vol. 1, 325, vol. 10, 304.

[1017] Some have argued that the sole purpose of the 'Imāmī jurists in using the expression "a just ruler" or other descriptive equivalents was *taqiyya* (dissimulation) in order to avoid a confrontation with the illegitimate authority under which they lived. By diluting the term just *'imām*, Shī'ī jurists would avoid explicit condemnation of those *de facto* in power. See the dissertation by Norman Calder, "The Structure of Authority in 'Imāmī Shī'ī Jurisprudence" (London: School of Oriental and African Studies, 1980). But this point is challenged by the fact that 'Imāmī jurists argued that a Muslim may not assist an unjust ruler against rebels.

unjust ruler have not committed an infraction; rebellion is an infraction only if committed against a just ruler. Yet, 'Imāmī jurists often state that if enjoining the good and forbidding the evil requires killing or injury, the permission of the Imām is required. That practically closes the gate to rebelling against an unjust ruler. But the rationale for this prohibition is functional or utilitarian. The 'Imām's deputy (*nā'ib al-ghayba*) may authorize a rebellion, but only if certain conditions are met.[1018] Among the conditions are the avoidance of *fitna* and harm. However, in most circumstances, rebellion against unjust rulers results in *fitna* and greater harm than good, and in many circumstances, rebelling is as if one is casting oneself unto ruin (i.e. a form of suicide). Therefore, one should not enjoin the good or forbid the evil against an unjust ruler unless there is a greater probability that doing so would be effective and would not endanger the enjoiner's safety or the safety of others. If a person or group reasonably believes that enjoining the good and forbidding the evil will either be ineffective, or will endanger their own safety or the safety of others, then one should refrain from doing so.[1019]

In the opinion of most jurists, resistance to unjust or, in the discourse of some, illegitimate rulers should be largely passive. A Muslim should not support or aid unjust rulers in any material way. Working with unjust rulers might be a pragmatic necessity, but one should not engage in such conduct unless one knows, to a degree of certainty, that doing so will not entail committing an injustice. A Shī'ī must believe that he is applying the law of God by the authorization of the rightful ruler, and not the unjust ruler in power. Therefore, a Shī'ī's loyalty or commitment is not to the unjust ruler, and his service is not for the benefit of unjust rulers. In working with unjust rulers, a Shī'ī may, in fact, assist such a ruler in applying the Sharī'a, even if it is Sunnī law, but the Shī'ī must engage in a legal fiction -- the Shī'ī must believe that he is authorized by the rightful ruler. A Shī'ī may not commit injustice unless forced by the threat of serious harm. In situations of duress, a Shī'ī may practice dissimulation, however, under no circumstances may a Shī'ī help an unjust ruler kill the innocent. As discussed earlier, 'Imāmī jurists stress that dissimulation is not permitted if it entails murder.[1020] Furthermore, a Shī'ī may not assist an unjust ruler resist an insurrection or fight rebels.[1021]

[1018] Frequently, 'Imāmī jurists do not explicitly address rebellion but refer only to the duty to enjoin the good and forbid the evil. Enjoining the good and forbidding the evil could be through a variety of means including armed force. However, most 'Imāmī jurists do not approve of armed force if the result is a greater harm than good.

[1019] Muḥammad b. al-Murtaḍā (a.k.a. Muḥsin al-Fayḍ al-Kāshānī) (d. 1091/1680), *al-Maḥajja al-Bayḍā' fī Tahdhīb al-Iḥyā'* (Beirut: Mu'assasat al-'A'lamī li al-Maṭbū'āt, 1983), vol. 4, 111-3; al-Suyūrī, *Kanz*, vol. 1, 397, 407; al-Muḥaqqiq al-Ḥillī, *Sharā'i'*, vol. 2, 342; al-Ḥillī, *'Īḍāḥ*, vol. 1, 398; Ibn Ḥamza, *al-Wasīla*, in *Mawsū'at Silsilat al-Yanābī'*, vol. 9, 165; al-Ḥillī, *al-Sarā'ir*, in Ibid., vol. 9, 190; al-Ḥalabī, *'Ishāra*, in Ibid., vol. 9, 198; al-Hudhalī, *al-Jāmi'*, in Ibid., vol. 9, 239; Ibn al-Muṭahhar al-Ḥillī, *Qawā'id* in Ibid., vol. 9, 268. Al-Najafī, *Jawāhir al-Kalām*, vol. 21, 367-8, 371, 384-5, adds that in his age the conditions for rebellion are very difficult if not impossible to fulfill at 385. Al-'Āmilī, *Wasā'il*, vol. 11, 400-6, 409-11, 425, 464, 472, 482-3, 492, 497 records numerous conflicting traditions on rebellion and enjoining the good and forbidding the evil. Many traditions assert the futility of rebellion, and some traditions claim that the best way to resist an unjust ruler is through dissimulation. In a set of traditions, dissimulation is described as a form of *jihād*. Mughniyya, *Fiqh*, vol. 2, 283-4, argues that dissimulation and abandoning the duty to enjoin the good and forbid the evil is permissible only if the *furū'* (branches of religion) are involved. If, however, the *'uṣūl* (foundations of religion) are threatened, then *jihād* and the sacrifice of life and property becomes incumbent.

Concretely, passive resistance to an unjust ruler is expressed through non-cooperation and non-support. There is a pragmatic acceptance of the necessity of upholding the *de facto* structures of society and order. But this concession is not given without reservations or limitations. Not only is an unjust ruler not granted *de jure* recognition, but even more, one cannot cooperate with all the endeavors of an unjust ruler regardless of the consequences. Of course, 'Imāmī discourses arise from a specific theological framework which shapes its differentiation between legitimate and illegitimate authority. Nonetheless, at the procedural and symbolic level, the 'Imāmī response to injustice, however that injustice is defined, is similar to certain Sunnī responses in important respects. At the procedural level, Muslims may not assist an unjust ruler in committing injustice. At the symbolic level, the 'Imāmī discourse ends up making a point similar to the one made by the Sunnī revisionist school. Rebellion, in principle, is prohibited because of the social harm that it produces. However, this prohibition is only a default position; in the absence of countervailing circumstances, rebellion is prohibited. But this does not mean that rebellion can never be justified. Ultimately, obedience to an unjust authority is a pragmatic necessity, but it is not an ideal situation. As the Zaydī jurist al-Wazīr argues, the fact that the authority of an unjust ruler is recognized as a matter of necessity is evidence that such an authority is illegitimate. Therefore, for example, as al-Wazīr notes, the fact that under conditions of necessity a person may drink alcohol is evidence that the consumption of alcohol, under normal circumstances, is prohibited.[1022] This basic logic is accepted by Sunnīs and non-Sunnīs alike.[1023] Consequently, depending on the circumstances, rebellion might be justified. However, like the Sunnī revisionist trend, the explicit discourse of the jurists did not focus on the circumstances under which rebellion might be justified. Rather, the discourse focused on the status of rebels. As to the status of rebels, the symbolic component in 'Imāmī discourses was more pronounced than in the discourses of their Sunnī counterparts. If the ruler is just, those who rebel against him are *bughā*, but they are entitled to preferred treatment. If the ruler is not just, those who rebel against him have not committed an infraction, and the ruler cannot be assisted in fighting the rebels. As discussed above, the expression "a just ruler" is ambiguous, and, therefore, arguably, any illegitimate ruler is also an unjust ruler.[1024] Accordingly, it is possible that anyone who rebels against any illegitimate ruler, whether the ruler is just or not, is not a *bāghi* and has not committed an infraction. But by using the construction "a just ruler", instead of "the just ruler", the 'Imāmī discourses become purposely ambiguous, and such discourses no longer speak simply in terms of the legitimacy or illegitimacy of the temporal rulers. Rather, the 'Imāmī discourses become more pertinent, as a political and moral commentary, upon the contemporaneous reality under which the 'Imāmī jurists lived.

[1020] Al-Ḥillī, *al-Muhadhdhab*, vol. 2, 327; al-Muḥaqqiq al-Ḥillī, *Sharā'i'*, vol. 2, 344-5; al-Ḥillī, *'Īḍāḥ*, vol. 1, 399; al-'Āmilī, *al-Lum'a*, vol. 2, 420; al-Suyūrī, *Kanz*, vol. 1, 394; al-Ḥillī, *al-Sarā'ir*, in *Mawsū'at Silsilat al-Yanābī'*, vol. 9, 191; al-Hudhalī, *al-Jāmi'*, in Ibid., vol. 9, 240; Ibn al-Muṭahhar al-Ḥillī, *Qawā'id* in Ibid., vol. 9, 268-9. Al-Najafī, *Jawāhir al-Kalām*, vol. 21, 390-3, 407-10, adds that if threatened by death, a Shī'ī may kill a Sunnī because a thousand Sunnīs are not worth the life of one Shī'ī. This view is atypical.

[1021] Al-Ḥillī, *al-Sarā'ir*, in *Mawsū'at Silsilat al-Yanābī'*, vol. 9, 184; al-Hudhalī, *al-Jāmi'*, in Ibid., vol. 9, 238.

[1022] Al-Wazīr, *al-'Awāṣim*, vol. 8, 163-4.

[1023] See Ibid., vol. 8, 14-18, 75, 163-4.

[1024] Madelung, "A Treatise," 18-31, argues that after the 5th/11th century not every illegitimate ruler was considered unjust. I think his argument is persuasive.

Another area of considerable ambiguity, however, rich with symbolic content, is the 'Imāmī discourses on banditry. 'Imāmī jurists do not directly address the distinction between rebellion and banditry. However, their discourses implicitly assume that there is a difference between bandits and rebels, and that a significant part of the difference is the existence of a *ta'wīl*. The 'Imāmī definition of banditry, however, is quite broad. Banditry is the causing of corruption on the earth by terrorizing people through the use of the threat of material harm. The crime of banditry can be committed on land or sea, town or desert and in the abode of Islam or in the abode of non-Muslims, whether or not the victims or the offenders are Muslim.[1025] The focal point of the crime is the existence of terror. There is disagreement among the jurists, however, on whether an intent to terrorize is one of the elements of the crime. Some argue that if the effect of the criminal activity is to spread terror, then banditry exists whether or not the criminal intended to terrorize.[1026] Significantly, the resulting terror must be general in effect. In other words, if a person terrorizes another because of an individual or private enmity or rancor, this is not banditry. However, if the terror is indiscriminate or general in impact, even if the victims of the terror constitute a specific group, then the elements of banditry exist.[1027] Some jurists add that a person cannot be convicted of banditry unless the criminal is a person of disrepute (*min ahl*

[1025] Al-Najafī, *Jawāhir al-Kalām*, vol. 41, 564-5; al-Ṭarābulusī, al-Muhadhdhab, in *Mawsū'at Silsilat al-Yanābī'*, vol. 10, 170; al-'Āmilī, *al-Lum'a*, vol. 9, 290; al-Ḥillī, *'Īḍāḥ*, vol. 4, 542; al-Muḥaqqiq al-Ḥillī, *Sharā'i'*, vol. 4, 180.

[1026] Al-Najafī, *Jawāhir al-Kalām*, vol. 41, 566; al-'Āmilī, *al-Lum'a*, vol. 9, 290; al-Muḥaqqiq al-Ḥillī, *Sharā'i'*, vol. 4, 180; al-Ḥillī, *al-Sarā'ir*, in *Mawsū'at Silsilat al-Yanābī'*, vol. 10, 272; Ibn al-Muṭahhar al-Ḥillī, *Qawā'id* in Ibid., vol. 10, 431, adds that the bandits must have a degree of strength (*shawka*).

[1027] Al-Najafī, *Jawāhir al-Kalām*, vol. 41, 569.

al-riba). This is a limiting factor; a person must already be known as a criminal before being convicted of banditry, but there is significant disagreement among the jurists surrounding this element.[1028] Under the 'Imāmī definition of banditry, highway robbery or armed robbery is only one form of banditry.[1029] An arsonist who burns people's homes or businesses, or a person who seeks to take Muslims captive or commit rape is a bandit as well.[1030] Importantly, the definition of banditry is broad enough to apply to rebels who employ methods of terror or to unjust rulers who might terrorize the populace. Nevertheless, the resolution to this issue, perhaps wisely, is left ambiguous.[1031]

The Zaydī School

Zaydī jurists differentiate between a person who sins due to defiance and one who sins due to a mistaken belief. The former is described as *fāsiq taṣrīḥ* (iniquitous by defiance) and the later as *fāsiq ta'wīl* (iniquitous by interpretation). The iniquitous by defiance does not have a recognizable justification for sinning. The iniquitous by interpretation mistakenly believes that he is serving God or doing what is permitted by God. The iniquitous by defiance commits a much more grievous sin than the iniquitous by interpretation.[1032] An unjust ruler is placed in the category of the iniquitous by defiance, while a *bāghī* is placed in the category of the iniquitous by interpretation.[1033] A *bāghī* is someone who rebels against the just ruler while claiming to be right concerning an issue or a set of issues, and while alleging that the ruler is wrong.[1034] Therefore, Zaydī jurists explicitly state that an unjust ruler cannot be considered a *bāghī* although he is considered a sinner.[1035] At the same time, those who rebel against an unjust ruler cannot be considered *bughā* because they have not committed an infraction in the first place.[1036] By definition, *baghy*, which is considered a sin, can only be committed against a just ruler. This approach has the advantage of definitional clarity. *Baghy* is a technical category which applies only to those who rebel against a just ruler. An unjust ruler cannot be called a *bāghī*, but his sin is more grievous than the sin committed by the *bughā*.[1037]

[1028] Ibid., vol. 41, 567; al-'Āmilī, *al-Lum'a*, vol. 9, 291; al-Ḥillī, *'Īḍāḥ*, vol. 4, 543; al-Muḥaqqiq al-Ḥillī, *Sharā'i'*, vol. 4, 180; al-Ḥillī, *al-Muhadhdhab*, vol. 5, 122; al-Suyūrī, *Kanz*, vol. 2, 351; al-Rāwandī, *Fiqh*, vol. 2, 387.

[1029] Al-Najafī, *Jawāhir al-Kalām*, vol. 41, 588; al-Suyūrī, *Kanz*, vol. 2, 351.

[1030] Al-Najafī, *Jawāhir al-Kalām*, vol. 41, 566, 570; Fraud, conversion and theft are not crimes of banditry unless accompanied by the threat of harm and terror. See Al-Najafī, *Jawāhir al-Kalām*, vol. 41, 596.

[1031] There is wide disagreement among 'Imāmī jurists concerning the amount of discretion the *'imām* has in punishing the crime of banditry. Some argue for strict proportionality between the crime and punishment while others argue that the *'imām*, with some limitations, may choose the punishment that best serves the public interest. See Al-Najafī, *Jawāhir al-Kalām*, vol. 41, 573-97; al-'Āmilī, *al-Lum'a*, vol. 9, 294-302; al-Ḥillī, *'Īḍāḥ*, vol. 4, 543-4; al-Muḥaqqiq al-Ḥillī, *Sharā'i'*, vol. 4, 180-2; al-Ḥillī, *al-Muhadhdhab*, vol. 5, 123-6; al-Suyūrī, *Kanz*, vol. 2, 351-2; al-Rāwandī, *Fiqh*, vol. 2, 387.

Zaydī jurists argue that although the *bughā* are sinners, they are not considered unbelievers.[1038] Rebels against a just ruler are sinners because such a ruler is entitled to obedience.[1039] At the same time, if the rebels believe in good faith that they are right and possess a degree of strength (*shawka*), then they are entitled to be treated as *bughā* and not as common criminals or bandits.[1040] Zaydī jurists do not emphasize that the *bughā* must have a plausible interpretation, but only that they refuse to obey a just ruler while believing in the justness of their cause, and that the ruler's command is wrong.[1041] If a group qualifies as *bughā*, they become entitled to a particular form of treatment. The treatment of the *bughā* according to the Zaydī position is similar in many respects to the Sunnī position. If the *bughā* criticize the ruler, they may not be persecuted, but if they refuse to discharge an obligation or rise in armed rebellion, they may be fought. However, they should be warned first, since fighting is only a last resort.[1042] The wounded, fugitive and captive may not be killed unless the rebels have reinforcements *(fi'a)*. Flooding, fire and other means of indiscriminate slaughter may not be used unless for an absolute necessity. The ruler may not solicit the assistance of Muslims who would indiscriminately slaughter the rebels, and once the rebels surrender and the fighting ends, the rebels may not be executed and the prisoners must be released.[1043] Zaydī jurists are divided on the issue of the rebels' liability. It appears that the majority has held that the ruler, at his discretion, may hold the rebels liable for life and property destroyed during the course of the rebellion. However, rebels are held financially, and not criminally, liable, and only to the extent of the collective damage that they may have caused.[1044] Furthermore, any property that may have been usurped by the rebels must be returned to its rightful owner. However, if the owner is not known, the property is to be given to the public treasury. Property belonging to the rebels, other than property found in the war camp, may not be confiscated.[1045] Significantly, funeral prayers should not be performed on dead rebels. Nonetheless, despite the fact that rebels are considered iniquitous, their adjudications and testimony are accepted as long as they are not clearly erroneous or unsupportable.[1046]

[1032] Ibn al-Murtaḍā, *Kitāb al-Baḥr*, vol. 6, 415.

[1033] Ibid., vol. 6, 415.

[1034] Ibid., vol. 6, 415; al-Ṣan'ānī (d. 1331/1912), *Kitāb al-Rawḍ*, vol. 4, 331.

[1035] Ibn al-Murtaḍā, *Kitāb al-Baḥr*, vol. 6, 415.

[1036] Al-Wazīr, *al-'Awāṣim*, vol. 8, 14.

[1037] Ibn al-Murtaḍā, *Kitāb al-Baḥr*, vol. 6, 415.

[1038] Ibid., vol. 6, 419; 'Abbās b. 'Aḥmad b. 'Ibrāhīm, *Tatimmat Kitāb al-Rawḍ*, in al-Ṣan'ānī, *Kitāb al-Rawḍ*, vol. 4, 261-2.

[1039] Ibn al-Murtaḍā, *Kitāb al-Baḥr*, vol. 6, 387-8.

[1040] Ibid., vol. 6, 415.

[1041] Ibid., vol. 6, 415; al-Ṣan'ānī, *Kitāb al-Rawḍ*, vol. 4, 331.

[1042] Ibn al-Murtaḍā, *Kitāb al-Baḥr*, vol. 6, 387-8, 416, 423; al-Ṣan'ānī, *Kitāb al-Rawḍ*, vol. 4, 307.

[1043] Ibn al-Murtaḍā, *Kitāb al-Baḥr*, vol. 6, 417-9, 420-1; al-Ṣan'ānī, *Kitāb al-Rawḍ*, vol. 4, 331-3.

[1044] Ibn al-Murtaḍā, *Kitāb al-Baḥr*, vol. 6, 416, 421-2.

[1045] Ibid., vol. 6, 420-22; al-Ṣan'ānī, *Kitāb al-Rawḍ*, vol. 4, 332-4.

[1046] Ibn al-Murtaḍā, *Kitāb al-Baḥr*, vol. 6, 422-3.

Zaydī jurists clearly consider a rebellion against a just ruler as fundamentally unjustified. They seem to use the expressions just ruler and rightful ruler as equivalents, but there is considerable ambiguity surrounding both expressions. According to Zaydī theology, a rightful ruler must be from the family of the Prophet (*’ahl al-bayt*) and possess the requisite amount of learning and piety. The ambiguity remains, however, because it is possible for several rightful *’imāms* to exist at the same time.[1047] Furthermore, obedience is due to an *’imām* only if he is pious and just, otherwise the *’imām* loses his right to obedience.[1048] Regardless of the problems of definition, if the ruler is considered just, those who rebel against him are entitled to the treatment outlined above, because the rebels proclaim an honest disagreement over what is right or wrong. However, those who commit an armed insurrection without an interpretation or claim of right may be subject to execution. In fact, the main distinction between rebels and bandits is the existence of such an interpretation. Nonetheless, the nature of this interpretation or claim is not clear. Zaydī jurists state that the *bughā* fight out of religiosity (*tadayyunan*) while bandits fight out of greed.[1049] Furthermore, those who fight out of a raw desire for power are said not to be *bughā*.[1050] Hence, arguably, the *bughā* in Zaydī thought are those who rebel because of a perceived injustice or because they mistakenly believed that rebellion is part of the obligation to enjoin the good and forbid the evil. However, having argued that *baghy* can only be committed against an unjust ruler, Zaydī jurists, like the ’Imāmī jurists, do not conceive of the just ruler as having a relative claim to power. The *bughā* are treated with a degree of deference, not because their interpretation or cause is plausible and could ultimately be correct, but because they cannot be equated with those who are motivated by prurient interests. This leaves a high degree of uncertainty as to how to distinguish between those who are motivated by prurient interests and those who are not. For instance, the just ruler may decide to treat certain groups as bandits and not rebels. Hence, some Zaydī authorities state:

[1047] Gibb and Kramers, *Shorter Encyclopedia of Islam*, 652. See also, ‘Abbās b. ’Aḥmad b. ’Ibrāhīm, *Tatimmat Kitāb al-Rawḍ*, in al-Ṣan‘ānī, *Kitāb al-Rawḍ*, vol. 4, 19.

[1048] ’Ibrāhīm, *Tatimmat Kitāb al-Rawḍ*, vol. 4, 6.

[1049] Ibid., vol. 4, 22.

[1050] Ibid., vol. 4, 9.

> "The oppressors who usurp villages, towns and provinces may be treated as bandits. [This is because] they cause corruption on the earth, and usurp money when no one can assist [the victims]...Therefore, they deserve to be treated as bandits if the *'imām* prevails over them."[1051]

Conceptually, this quote does not apply to the *bughā* because it addresses those who victimize the innocent and usurp their money. Practically, however, it is possible that a ruler would refuse to recognize a certain secessionist group as *bughā*, accuse them of victimizing the innocent and of not having an interpretation, and treat them as bandits. Nevertheless, the ambiguity that exists in the distinction between the legal category of *bughā* and other categories is, arguably, a part of the dynamics of the negotiative process. If a presumed just ruler wrongfully accuses certain rebels, for instance, of being bandits and not *bughā*, and the jurists happen to disagree, the jurists may declare the ruler unjust.[1052]

Much of the attention of Zaydī jurists is focused on the issue of how one is to deal with unjust rulers. Zaydī jurists start out with the general principle: if the ruler is unjust, rebellion is not only permissible but obligatory. In fact, some jurists emphasize that one of the main differences between the Zaydī and 'Imāmī schools is that the 'Imāmīs prohibited rebellion against unjust rulers until the Qā'im appears, while the Zaydīs demanded immediate rebellion against injustice.[1053] Despite the declared general principle, Zaydī jurists place the same limitations and restrictions on rebellion set by jurists from other schools. Rebellion or enjoining the good and forbidding the evil should be exercised only if it is potentially effective, the good outweighs the evil, and the risk of *fitna* is not very high. Accordingly, obeying an unjust ruler might be necessary if rebellion will produce undue civil strife.[1054] Some Zaydī jurists caution against foolishly engaging in rebellions because, according to them, since the 'Umayyad and 'Abbāsid eras, and up to the 11th/17th century, one can readily observe the amount of chaos and hardship that has resulted from rebellions. Therefore, often the best response to injustice is patience.[1055] These jurists argue that it is exactly because of the drastic results of rebellion that the Prophet's traditions often emphasize the duty of obedience and patience. These traditions should be interpreted to mean that unless rebellion has a reasonable chance of success and will not result in greater harm than good, one should obey and be patient. However, if a person subjectively but honestly believes that the conditions are appropriate, and then rebels, seeking to enjoin the good and forbid the evil, he is not blameworthy.[1056]

[1051] Ibn al-Murtaḍā, *Kitāb al-Baḥr*, vol. 6, 202.

[1052] Ibid., vol. 6, 387-8, argues that if a person violates his oath of allegiance to a just ruler then he has sinned unless the just ruler has breached his obligations. The issue of breach of obligations leaves room for negotiation.

[1053] Ibid., vol. 1, 40-1.

There is not much discussion in Zaydī sources on what forms of rebellion against unjust rulers are permitted. For example, are acts of brigandage a legitimate form of rebellion? Interestingly, however, there is a discussion regarding assassinating unjust rulers and their aides. The majority of Zaydī jurists apparently had held that assassinations are not subject to a utilitarian balancing analysis. Rather, assassinations are simply prohibited, but the assassinator is liable only for the blood money, and may not be physically punished.[1057] Other than violent forms of resistance, Zaydī jurists also address the amount of cooperation permissible between Muslims and unjust rulers. Muslims may engage in *jihād* with unjust rulers against non-Muslim enemies. Muslims, however, should not trust or support unjust rulers or assist unjust rulers in propagating injustice.[1058] Arguably, this means that Muslims may not assist an unjust ruler in fighting those who rebel against him. Even more, if an unjust ruler is ultimately defeated, he may possibly be treated as a bandit. Both unjust rulers and bandits are considered iniquitous by defiance (not by interpretation). As the passage quoted above indicates, the just ruler may treat oppressors who cause corruption on the earth and usurp people's money as bandits. The category of oppressors who cause corruption on the earth and usurp people's money might be broad enough to encompass unjust rulers.

[1054] Al-Wazīr, *al-'Awāṣim*, vol. 8, 75, 163-7.

[1055] 'Ibrāhīm, *Tatimmat Kitāb al-Rawḍ*, vol. 4, 8-9.

[1056] Ibid., vol. 4, 9, 19.

[1057] Ibn al-Murtaḍā, *Kitāb al-Baḥr*, vol. 6, 423.

The 'Ibāḍī School

Like the Zaydī school, the 'Ibāḍī school's discourse on rebellion is infused with theological paradigms which differentiate between piety and sinfulness, and belief and disbelief. However, unlike the Zaydīs and 'Imāmīs, the 'Ibāḍīs supported the idea of rebellion against 'Alī. Much of their theology focuses on the legitimacy of rebellion, and on resistance to rebellion. According to 'Ibāḍī theology, 'Alī committed a grievous error when he failed to fight Mu'āwiya who is seen as a rebel against 'Alī. Because of this presumed grievous error, it became incumbent on every Muslim to reject 'Alī's caliphate and rebel against him. Muslims who continued to support either 'Alī or Mu'āwiya have committed a major sin. Hence, the failure to uphold the truth, whether it is in resisting rebellion or in failing to rebel, is a grievous sin. Unlike other sects of the Khawārij, the 'Ibāḍīs held that their opponents are not polytheists (*mushrikūn*) but *kuffār*. In this context, *kuffār* does not necessarily mean unbelievers; rather, it means not true or genuine Muslims.[1059] Therefore, the 'Ibāḍīs held that it is legal to intermarry and inherit from their opponents, and that their opponents may not be killed or enslaved and their properties may not be taken as booty.[1060]

[1058] Al-Ṣan'ānī, *Kitāb al-Rawḍ*, vol. 4, 306; Ibn al-Murtaḍā, *Kitāb al-Baḥr*, vol. 6, 396.

The history of the 'Ibāḍiyya traces back to 'Abd Allāh b. 'Ibāḍ al-Murrī al-Tamīmī who dissociated himself from the more extreme Khawārij in the first century of Islam. The early 'Ibāḍīs oscillated between policies of cooperation and rebellion against the 'Umayyads and 'Abbāsids. Nevertheless, they managed to establish independent principalities, notably in Oman by al-Julandā b. Mas'ūd b. Ja'far b. al-Julandā (131/748), and Western Algeria by 'Abd al-Raḥmān b. Rustam (161/778). Although the Rustamids were defeated by the Fāṭimids in 296/909, from the second Rustamid ruler, 'Abd al-Wahhāb b. 'Abd al-Raḥmān (r. 171/788 - 208/824), emerged the most important 'Ibāḍī sect, the Wahbiyya. Furthermore, the Ya'rubids (1034/1625 - 1156/1743) and the Āl Bū Sa'īds (1167/1754 - present) established 'Ibāḍī rule in Oman.[1061] Throughout their history, the 'Ibāḍīs dealt with conflicts with external, non-'Ibāḍī enemies as well as internal rebellions. As recently as 1333/1913, the 'Ibāḍī jurists led a rebellion against what they regarded as the corrupt rule of the Bū Sa'īds. Therefore, 'Ibāḍī discourses deal with rebellion against non-'Ibāḍī and 'Ibāḍī rulers, and their discourses are replete with references to the actual practices of 'Ibāḍī rulers throughout history. Most of the available texts were written by Wahbī 'Ibāḍī jurists, and tend to cite the practices of 'Ibāḍī 'Imāms in Oman and South Arabia.

In 'Ibāḍī thought, only a rightful and just ruler is entitled to obedience. A rightful ruler must follow the Wahbī 'Ibāḍī sect, although a ruler may be just, but not rightful.[1062]

[1059] 'Ibāḍī sources refer to their opponents as *'ahl al-tawḥīd* or *'ahl al-qibla* (people of faith), therefore indicating that such opponents are not considered unbelievers.

[1060] Al-Shahrastānī, *al-Milal wa al-Niḥal*, vol. 1, 156-9; al-Baghdādī, *al-Farq*, 70; Abū Bakr 'Aḥmad b. 'Abd Allāh b. Mūsā al-Kindī (d. 557/1162), *al-Muṣannaf* (Oman: 'Īsā al-Bābī al-Ḥalabī, n.d.), vol. 11, 103, 250, 264; al-Sa'dī, *Qāmūs al-Sharī'a*, vol. 8, 106, vol. 9, 297-301.

[1061] Zanzibār was ruled by the Āl Bū Sa'īd from 1256/1840 to 1383/1964. See Bosworth, *The New Islamic Dynasties*, 27-8, 111, 113-5, 137; Gibb and Kramers, *Shorter Encyclopedia of Islam*, 143-5; J.C. Wilkinson, *The Imamite Tradition of Oman* (Cambridge: Cambridge University Press, 1987), esp. pp. 12-14. See, also, al-Ziriklī, *al-'A'lām*, vol. 4, 144.

If a ruler is just, even if not rightful, rebellion might not be obligatory.[1063] A rightful ruler must be pious and knowledgeable, but does not need to belong to a particular family or tribe, and, in principle, rule by succession or usurpation is not recognized.[1064] The ruler is picked by the jurists with the general acquiescence or approval of Muslims.[1065] If the jurists are not confident about the qualifications of a candidate, they may contract the rulership to him on the condition that he does not decide certain issues without consultation with a council of jurists. If he fails to abide by the condition, he may be removed from office.[1066] Furthermore, the jurists may contract rulership to someone for a one-year probationary period after which a more permanent arrangement is considered.[1067] If any rightful ruler becomes unjust or commits a major sin, unless he repents, he may be removed from office, even by force if necessary.[1068] It is obligatory upon every Muslim to investigate the merits or demerits of a ruler, and to reach a decision as to any competing claims.[1069] Importantly, the consensus of the majority of the notables or jurists that a ruler should be removed is strong and persuasive evidence of the necessity of such removal, but

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[1062] Al-Kindī, *al-Muṣannaf*, vol. 10, 55, 57, 97; al-Sa'dī, *Qāmūs al-Sharī'a*, vol. 8, 101, vol. 9, 253, 279. See Ḍiyā' al-Dīn 'Abd al-'Azīz al-Tamīmī (d. 1223/1808), *Kitāb al-Nīl wa Shifā' al-'Alīl* (Jedda: Maktabat al-'Irshād, 1985), vol. 14, 476. (The commentary by Muḥammad b. Yūsuf 'Aṭfayyish, *Sharḥ Kitāb al-Nīl* is in the margins).

[1063] Al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 311, 341; al-Kindī, *al-Muṣannaf*, vol. 10, 60; Khamīs b. Sa'īd b. 'Alī b. Mas'ūd al-Shaqaṣī al-Rustāqī, *Manhaj al-Ṭālibīn wa Balāgh al-Rāghibīn*, ed. Sālim b. Ḥāmid b. Sulaymān b. al-Ḥārithī (Oman: 'Īsā al-Bābī al-Ḥalabī, 1983), vol. 8, 76.

[1064] Al-Kindī, *al-Muṣannaf*, vol. 10, 60, 63, 78-9, states that it is preferred that the ruler be a pure Qurayshī; al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 358; al-Rustāqī, *Manhaj*, vol. 8, 44-5.

[1065] Al-Kindī, *al-Muṣannaf*, vol. 10, 10, 60, 98; al-Sa'dī, *Qāmūs al-Sharī'a*, vol. 9, 264; al-Rustāqī, *Manhaj*, vol. 8, 44, 50.

[1066] Al-Kindī, *al-Muṣannaf*, vol. 10, 69-70; al-Rustāqī, *Manhaj*, vol. 8, 45-7, 59.

[1067] Al-Rustāqī, *Manhaj*, vol. 8, 51.

[1068] Al-Kindī, *al-Muṣannaf*, vol. 10, 126, 193, 207-8, 215, 218; al-Sa'dī, *Qāmūs al-Sharī'a*, vol. 8, 103-4.

[1069] Al-Kindī, *al-Muṣannaf*, vol. 10, 194-5; al-Rustāqī, *Manhaj*, vol. 8, 99-101; al-Sa'dī, *Qāmūs al-Sharī'a*, vol. 8, 115-6, vol. 9, 53. However, al-Sa'dī argues that the consensus of the jurists on the appointment or removal of a ruler is binding on everyone. Ibid., vol. 9, 264, 332. But see Ibid., vol. 9, 281, for the views of the Nazwāniyyūn. The author seems to contradict himself in vol. 9, 287, 291, 335, 350-1.

it does not necessarily establish the fact conclusively. The extent to which the jurists' opinions are binding depends on the issue under consideration, but ultimately, each individual must decide, for himself, whether to join a certain rebellion.[1070]

'Ibāḍī discourses on rebellion are extensive, and they combine elements of idealism and pragmatism in a complex mosaic. They focus not only on whether one should rebel against an unjust ruler, but also on the mechanics by which the justice or injustice of a ruler is ascertained. Furthermore, rebellion is not conceived of simply as an armed insurrection, but ranges in scope from the act of disavowing a certain ruler to non-cooperation and dissimulation, and ultimately, to an armed challenge to power. We have already noted that according to 'Ibāḍī thought, only a rightful and just ruler is entitled to obedience, but 'Ibāḍī jurists deal with the mechanics by which a claim is made that such a ruler is no longer rightful or just. In order to understand 'Ibāḍī discourses, one should keep in mind that the 'Ibāḍī concept of *baghy* is very broad. 'Ibāḍī jurists employ the term to mean the act of committing an injustice or exceeding the bounds. Therefore, anyone who commits an injustice or sin could be a *bāghi*.[1071] Furthermore, *baghy* is not a constant or static category; someone could start out at the beginning of a conflict just, and end up being a *bāghī*, or alternatively, one could start out a *bāghī*, but end up just. Which category one fits in depends on the type of claim made, and the behavior of the contending parties.[1072]

Truth in all worldly and religious affairs is singular and absolute, however, people imperfectly understand such truth according to the evidence and intellect that they possess. Hence, as to all competing claims, there is a singular truth, but people may disagree because of the fact that they are limited in their ability to seek or understand such truth.[1073] As a matter of principle, in most disputed issues, a rightful ruler is entitled to a presumption of good faith. As long as a matter is open to interpretation, a rightful ruler is entitled to the benefit of the doubt, and hence, he should not be disobeyed or resisted.[1074] Beyond this general principle, 'Ibāḍī jurists divide all disputes into three main categories. The first are called disputes of opinion (*'ikhtilāf al-ra'y*). Disputes of opinion relate to what is lawful or unlawful, but which is not clearly covered by the Qur'ān, the *Sunna* or consensus of the jurists. Over disputes of opinion, disagreement is legitimate, and one does not need to disavow (*bārā'a*) one side or the other.[1075] The ruler is entitled to a degree of deference over such disputes, consequently, disputes of opinion do not create an unwavering obligation to rebel.[1076] The second type of disputes are disputes of competing claims (*'ikhtilāf da'āwī*). Disputes of claims relate to issues in which the law is not in question, but the facts are in dispute. These are disputes in which if all the parties agree on the facts or the intents of the people involved, the law would clearly settle the matter.[1077] For example, whether someone stole or usurped certain property is a dispute of claims. A dispute as to whether a rebellious group is motivated by blind tribalism or religious zeal is a matter of intent and fact, and therefore, is a dispute of competing claims as well. If the jurists are in disagreement as to who is right or wrong, a Muslim has the right to disavow whichever party he does not believe. Conversely, a Muslim has the right to ally himself (*yatwallā*) to whichever party he happens to believe. A Muslim should not join either of the disputing parties unless he affirmatively believes in the justice and truthfulness of one of the sides.[1078] If he does not know who is right or wrong, he has an obligation to inquire and investigate in order to reach a decision. Significantly, a Muslim should not rely on the statements made by the ruler or his army, but should ask credible Muslims who are not biased.[1079] If he is unable to ascertain the true from the false, then it is permissible to abstain from judgment (*wuqūf*) until such time that he is able to decide.[1080] However, it is not permissible for a Muslim to abstain or exercise neutrality as a way of life or as a permanent condition (*lā yanṣibu al-shaka dīnā*). Therefore, in the words of one 'Ibāḍī jurist: "A person must distinguish between the people of the truth and the people of error. It is a binding obligation upon him to investigate and differentiate between them. The righteousness of truth is not affected by the prevalence of error."[1081] Abstaining from judgment should only be a temporary state produced by a lack of information, created by a specific context in a particular dispute.[1082] Importantly, as to disputes of claims, the consensus of the jurists could settle a particular dispute, and such a resolution is considered binding on all.[1083]

[1070] Al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 343-4. The author also argues that generally a person should follow the guidance of the jurists. But if a person engages in a *fitna*, he will be excused if the jurists are in disagreement on the matter, Ibid., 716-7. See al-Sa'dī, *Qāmūs al-Sharī'a*, vol. 9, 259, 332; al-Rustāqī, *Manhaj*, vol. 8, 83.

[1071] For example, see the broad usage of the term *baghy* in al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 397-8, 433-7, 753-4; al-Kindī, *al-Muṣannaf*, vol. 11, 117; al-Rustāqī, *Manhaj*, vol. 8, 24.

[1072] Al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 585, 663-4, 673-4, 712; al-Kindī, *al-Muṣannaf*, vol. 10, 194-5, 198.

[1073] Al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 585, 685; al-Sa'dī, *Qāmūs al-Sharī'a*, vol. 8, 115-6, vol. 9, 241, 254-5, 323-4; al-Rustāqī, *Manhaj*, vol. 8, 99-101.

[1074] Al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 722-35; al-Kindī, *al-Muṣannaf*, vol. 10, 219; al-Sa'dī, *Qāmūs al-Sharī'a*, vol. 9, 253, 312, 320, 326, 330-2; al-Rustāqī, *Manhaj*, vol. 8, 70, 79.

[1075] Al-Sa'dī, *Qāmūs al-Sharī'a*, vol. 9, 254-6.

[1076] Al-Kindī, *al-Muṣannaf*, vol. 10, 219; al-Rustāqī, *Manhaj*, vol. 8, 70, 79.

[1077] Al-Sa'dī, *Qāmūs al-Sharī'a*, vol. 9, 257-8, 262.

The third form of disputes are disputes of heresy (*'ikhtilāf al-bida'*). These are disputes involving issues that are clearly settled in religion, and are not a proper subject for disagreement.[1084] For example, the prohibition against drinking alcohol, eating pork or taking Muslims as booty in war are clearly established in religion. As to this category, the ruler is not entitled to deference, and even the consensus of all the jurists may not alter the law. For instance, it is argued that if all the jurists in the world argued that it is proper to enslave Muslims or to drink alcohol, that would not alter the law. Furthermore, if all the jurists agreed that the party of *bida'* is correct, that would be ineffective and irrelevant.[1085] Therefore, if a ruler murders an innocent person, he would clearly abdicate his right to rule, and would even be liable for the murder, whether he personally committed the murder or ordered someone else to execute it.[1086] If the ruler denies that he committed the murder, that would be a dispute of claims because it relates to an issue of fact. But if it is established that he did commit the murder, there should be no question that he is liable and that he abdicated his right to rule. In disputes of heresy, every Muslim must disavow what is wrong, and if he does not, he is liable in the Hereafter. Furthermore, in this category of disputes, whomever is wrong is the *bāghī*, regardless of his official position. Even if the facts are in dispute, if it becomes widely believed that the ruler has committed major sins, has become unjust or ineffective, or is unwilling to apply the law, then he must be removed.[1087]

[1078] Al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 341; al-Sa'dī, *Qāmūs al-Sharī'a*, vol. 9, 257-8, 326, 350-1, adds that if Muslims are uncertain about who is right or wrong then the original presumption in favor of the ruler stays in effect until such time as it is rebutted. In other words, in a case of uncertainty, the ruler remains entitled to rule. See, also, al-Rustāqī, *Manhaj*, vol. 8, 79.

[1079] Al-Rustāqī, *Manhaj*, vol. 8, 99-101.

[1080] Al-Sa'dī, *Qāmūs al-Sharī'a*, vol. 8, 109, 112-6, 118, vol. 9, 5-7, 43-5.

[1081] Al-Sa'dī, *Qāmūs al-Sharī'a*, vol. 8, 115.

[1082] Al-Sa'dī, *Qāmūs al-Sharī'a*, vol. 9, 46, 53, adds that when people disagree and accuse each other of being wrong, investigating the truth becomes a binding duty (*farḍ*). If a person does not investigate because he is too preoccupied with making a living and feeding his children, that person is not blameworthy as long as he had formed an intent to investigate, but never had the opportunity to give force to such an intent.

[1083] Al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 716; al-Sa'dī, *Qāmūs al-Sharī'a*, vol. 8, 109, vol. 9, 264.

[1084] Al-Sa'dī, *Qāmūs al-Sharī'a*, vol. 9, 258-9, 282. See al-Warjalānī, *al-'Adl*, 109.

All disputes, except the disputes of heresy, are a form of *fitna*. That, however, does not mean that either side to the dispute is a *bāghī*. One becomes a *bāghī* when one exceeds the bounds of what is legitimate in a dispute.[1088] While the ruler is entitled to the benefit of the doubt, every Muslim, including the jurists, must support what they believe to be just.[1089] The benefit of doubt granted to the ruler is not permanent or absolute.[1090]

[1085] Al-Sa'dī, *Qāmūs al-Sharī'a*, vol. 9, 241, 259, 264.

[1086] Al-Kindī, *al-Muṣannaf*, vol. 10, 218.

[1087] Al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 341-2; al-Kindī, *al-Muṣannaf*, vol. 10, 215; al-Sa'dī, *Qāmūs al-Sharī'a*, vol. 8, 109, vol. 9, 303.

[1088] Al-Kindī, *al-Muṣannaf*, vol. 10, 194-5; al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 615, 628, 663-4, 666, 712.

The jurists, or presumably a judge, could hold in the final analysis that either side to a dispute was correct. In that case, the group that violated the ruler's commands will not be held liable. Furthermore, as explained below, in certain matters, the ruler or his agents may be held liable for attempting to enforce illegal commands. As to most issues, at the procedural level, if a group, in a matter involving a dispute of opinion or claims, has a grievance against the legitimate ruler, they may adhere to their opinions and may even speak against the ruler; that in itself will not make them *bughā*.[1091] The group should present its evidence and give the ruler an opportunity to respond, but since the ruler is entitled to the benefit of the doubt, they should not resort to force. If the group insists on disobeying the law or seeks to remove the ruler by force, the group becomes the *bughā*.[1092] Moreover, if the ruler admits his errors and repents, yet the group refuses to accept his repentance, the group becomes the *bughā* as well. However, if the ruler refuses to reform and insists on injustice, it might become legitimate to use force against him.[1093] Nevertheless, it is not clear whether the ruler's repentance is accepted in the case of murder or rape.[1094]

Effectively, in 'Ibāḍī thought, armed rebellion against a legitimate ruler is permitted if the ruler commits major sins or if the jurists agree that he is no longer fit to rule. Furthermore, if there is general agreement that the ruler is consistently unjust, that might

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[1089] Alternatively, if they do not know who is right or wrong, they may abstain, see al-Kindī, *al-Muṣannaf*, vol. 10, 194; al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 684-5, 689, argues that it is a major sin to fight on someone's side out of blind loyalty.

[1090] Al-Sa'dī, *Qāmūs al-Sharī'a*, vol. 8, 101, vol. 9, 335, argues that even if the ruler was appointed through a consensus, it is not permissible to claim that the ruler is correct and every rebel is wrong. See al-Rustāqī, *Manhaj*, vol. 8, 52, 79, 99-100.

[1091] Al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 336-7.

[1092] Al-Kindī, *al-Muṣannaf*, vol. 10, 196, 198, vol. 11, 216.

[1093] Al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 341-2; al-Kindī, *al-Muṣannaf*, vol. 10, 215.

[1094] Al-Kindī, *al-Muṣannaf*, vol. 10, 217, asserts that the ruler abdicates his right to rule the minute he commits a capital crime.

legitimate rebellion as well.[1095] In these situations, the rebels are not *bughā* because they have not exceeded the bounds. In disputes involving competing claims or opinions, a Muslim is not a *bāghī* and does not commit a sin by supporting one side or another as long as force is not used. In fact, every Muslim must investigate and make an affirmative determination as to who is right or wrong.[1096] Some claims are by definition illegitimate, and not recognized; for instance, disputes involving family honor or tribalism and disputes in which the rebels are advocating heresy. Otherwise, in disputes of claims or opinions, the *bāghī* is whoever unjustly resorts to force or exceeds the proper limits of conduct. Of course, differentiating between when one is a *bāghī* or not involves the drawing of subtle, and perhaps haphazard, distinctions. It is not clear, for example, when might one decide that a ruler's injustice has become widespread and well-known, and therefore, armed rebellion is permissible. It is also not clear what the proper balance is between the presumption of good faith conceded to legitimate rulers, and the imperative of resisting sin and injustice.

Regardless of the nature of the claims made against him, the legitimate ruler is bound by several rules of conduct. He must strive to settle disputes peacefully, and must warn his opponents before resorting to force.[1097] The ruler may not fight the *bughā* unless they resort to arms or insist on not complying with the law -- for instance, if they refuse to pay taxes.[1098] Interestingly, when debating or warning the rebels, a ruler should not call upon such rebels to obey him, but must call upon them to submit to the law of God. In other words, the emphasis of the ruler should not be on allegiance to him personally, but on submission to the institution of *Sharī'a*.[1099] If his opponents continue to refuse, he may fight them but only to bring them to the fold and not to slaughter them. The laws regulating the treatment of rebels is similar to the non-'Ibāḍī schools. The ruler is under an obligation to instruct his army as to the rules of engagement, and the limitations on the conduct of warfare. If the rulers' army violates the rules, the public treasury must compensate the victims. If the ruler does not properly instruct his army, he might be held personally liable.[1100] Furthermore, the ruler may not seek the assistance of a group that might violate the rules of conduct because of a pre-existing enmity towards the rebels. In the opinion of the majority of jurists, the wounded and fugitive may not be dispatched unless the rebels have reinforcements *(fi'a)*. Some argue that in all circumstances, the wounded may not be dispatched.[1101] Furthermore, there is disagreement among the 'Ibāḍī jurists as to whether the captive may be killed during the continuation of the fighting.[1102] The ruler may not use weapons of indiscriminate destruction unless for an absolute necessity.[1103] However, there is disagreement as to whether fire may be used against the rebels, and as to whether the rebels may be denied food or water.[1104] Nonetheless, torture, mutilation or needless destruction of property or trees is not permitted.[1105] Furthermore, rebels may not be enslaved, and their property may not be confiscated. In the opinion of some, rebels' weapons and horses may be sold, but the money from such a sale should be returned to the rebels.[1106] After the fighting ends, prisoners may not be executed, and must be released. However, in the view of some 'Ibāḍī jurists, the leader of the rebels may be executed if he is responsible for murders.[1107]

[1095] Al-Rustāqī, *Manhaj*, vol. 8, 54; al-Kindī, *al-Muṣannaf*, vol. 10, 193; al-Sa‘dī, *Qāmūs al-Sharī‘a*, vol. 9, 303, 314, 319, raises doubts as to whether a consensus on the removal of a ruler could ever exist. Therefore, if a sizable group knows of the ruler's injustice, it should rebel and should not wait until the populace shares its views. Al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 343-4, asserts that the existence of a general consensus that a ruler should be removed is evidence against him. Al-Rustāqī, *Manhaj*, vol. 8, 83, argues that if the notables agree that the ruler has committed what warrants his removal, that is to be taken as evidence against the ruler even if the populace does not concur.

[1096] Al-Sa‘dī, *Qāmūs al-Sharī‘a*, vol. 9, 320.

[1097] Al-Rustāqī, *Manhaj*, vol. 8, 37, asserts that if there is clear evidence that a group of people gave their oath of allegiance to a challenger, the just ruler may imprison the challenger and his followers until they repent. After repenting, they must be released.

[1098] Al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 383, 570; al-Kindī, *al-Muṣannaf*, vol. 11, 118, 215, 220-2; al-Rustāqī, *Manhaj*, vol. 8, 13, 24, 97-8.

[1099] Al-Kindī, *al-Muṣannaf*, vol. 11, 220; al-Rustāqī, *Manhaj*, vol. 8, 97, 99.

[1100] Al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 385-6, 390-1, 598-600, the ruler and his soldiers are liable for committing acts of injustice. However, not all the soldiers are collectively liable; it is possible for a group of soldiers to be liable while the other groups are not. See, also, al-Kindī, *al-Muṣannaf*, vol. 11, 234.

[1101] Al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 381, 383; al-Rustāqī, *Manhaj*, vol. 8, 113-5; al-Kindī, *al-Muṣannaf*, vol. 11, 98, 102, 243. Several jurists argue that the wounded who are too weak to fight should not be killed, even if the rebels have reinforcements.

[1102] Al-Rustāqī, *Manhaj*, vol. 8, 114, asserts that the ruler should consult the jurists as to the fate of rebels captured while the fighting is continuing.

[1103] Al-Kindī, *al-Muṣannaf*, vol. 11, 228, argues that if arrows or rocks are used, and women and children are killed, the loyalists must pay the blood money.

[1104] Al-Rustāqī, *Manhaj*, vol. 8, 97, 119; al-Kindī, *al-Muṣannaf*, vol. 11, 224-6, 239, 241-2, adds that water may be denied rebels during a siege but not if they have livestock with them. Food or water may not

The above mentioned rules of conduct apply to fighting any *bughā* whether the opponents are 'Ibāḍīs or not, and regardless of the reason for the fighting. Therefore, the same rules apply even if the 'Ibāḍī ruler is fighting Sunnīs.[1108] If the ruler, himself, exceeds the proper bounds, he may be considered a *bāghi*, and will be held liable for his violations. These same rules of conduct apply to rebels as well. Consequently, if either party violates the proscribed rules of conduct, they are liable for their excesses. Importantly, the majority of 'Ibāḍī jurists argue that if the rebels are motivated by piety and not greed, they are not to be held liable for life or property destroyed in the fighting. The rebels need not have an interpretation, but must be motivated by considerations of right and wrong which arise from a religious conviction.[1109] Those who fight for family honor or tribal reasons are not exempt from liability.[1110] Rather, it must be ascertained that the

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be denied to rebels if they have women and children with them. The use of fire or flooding is not permitted. The author cites an incident in 'Ibāḍī history where rebels' homes were burned, so the ruler paid the rebels compensation.

[1105] Al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 384-5, 421, adds that the people of Ḥadramūt cut down the trees of rebels. See, also, al-Kindī, *al-Muṣannaf*, vol. 11, 236; al-Rustāqī, *Manhaj*, vol. 8, 120-1.

[1106] Al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 383; al-Kindī, *al-Muṣannaf*, vol. 11, 230-232.

[1107] Al-Kindī, *al-Muṣannaf*, vol. 11, 229, 245, 247-9, 251, a minority view maintains that if certain rebels are seen killing people, the ruler has discretion in killing them. However, al-Kindī asserts that there is consensus that rebels who rely on an interpretation may not be held liable for life or property. Al-Rustāqī, *Manhaj*, vol. 8, 114-6, adds that when 'Imām Ghasān b. 'Abd Allāh captured the rebel leader 'Īssā b. Ja'far, the 'imām consulted the jurists. The jurists advised that the matter was to be left to his discretion. However, the 'imām decided not to kill him in order to avoid the possibility of committing a sin.

[1108] The 'Abbāsids and 'Umayyads are considered *bughā*. See al-Rustāqī, *Manhaj*, vol. 8, 73-4.

[1109] Al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 393; al-Kindī, *al-Muṣannaf*, vol. 11, 251-2.

rebels were motivated by matters of conscience and piety. Whether the rebels were ultimately right or wrong is not relevant because it is the subjective intent of the parties which is considered material. If the rebels believed, in good faith, in the legality of their behavior, they should not be held liable for the life and property destroyed in the fighting. However, like the jurists of the other schools, the 'Ibāḍī jurists disagree as to whether rebels who commit acts of banditry or rape may be considered to be people of piety. The majority view is that the terrorizing of the wayfarer or raping and pillaging is irrebuttably presumed to be contrary to piety.[1111] Therefore, if a group commits acts of banditry, they may be treated as common criminals, and they may be held liable for life and property destroyed during the course of fighting.[1112] Arguably, however, the accusation of banditry is equally applicable to unjust rulers. Unjust rulers who terrorize people and attack without warning may be fought as bandits.[1113]

The 'Ibāḍī doctrines on the rules of conduct are, for the most part, limiting or control factors. 'Ibāḍī jurists negotiated and balanced two competing values. On the one hand, a legitimate ruler is entitled to obedience so that law and order may be upheld. On

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[1110] Al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 664, 698; al-Kindī, *al-Muṣannaf*, vol. 11, 119-20.

[1111] Al-Kindī, *al-Muṣannaf*, vol. 11, 118, 223, 249, argues that those who commit acts of banditry should not be fought as rebels, and should be treated as bandits; al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 542, 557-8, argues that if a *bāghī* seeks to assault or rape a woman, he may be killed; al-Rustāqī, *Manhaj*, vol. 8, 237, argues that arson is an act of banditry, but it is not clear if an arsonist is a bandit even if he relies on an interpretation.

[1112] In certain contexts, al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 622, distinguishes between common bandits and religiously motivated bandits. Religiously motivated bandits may not be fought without warning. Some 'Ibāḍī jurists adopt the view that bandits should not be held liable for life or physical injuries inflicted during the time in which bandits are resisting arrest. The logic for this minority view is reciprocity. The ruler is not liable for life or injuries inflicted upon the bandits during fighting, so they should not be held liable either. Bandits, however, are liable for acts of banditry, see al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 612, 614. Al-Kindī, *al-Muṣannaf*, vol. 11, 240-1, reports that the Qarāmiṭa were fought as non-Muslims because they burned the homes of Muslims and indiscriminately killed Muslims. Since the Qarāmiṭa employed means similar to those used by bandits, it became permissible to kill their captive and fugitive, and to burn their homes. See, also, al-Rustāqī, *Manhaj*, vol. 8, 37, 127.

Many 'Ibāḍī jurists argue that a Muslim, even a bandit, may not be crucified. Crucifixion is reserved to non-Muslim bandits. See al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 612; al-Kindī, *al-Muṣannaf*, vol. 11, 274; al-Rustāqī, *Manhaj*, vol. 8, 126.

[1113] See al-Rustāqī, *Manhaj*, vol. 8, 107; al-Kindī, *al-Muṣannaf*, vol. 11, 223, 263; al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 617-8.

the other hand, 'Ibāḍī jurists were not willing to grant a legitimate ruler an absolute right to obedience, and were concerned with substantive issues of justice. Therefore, as noted above, the ruler should not call upon rebels to obey him, but call upon them to obey the law of God. This is not simply a rhetorical point because it is ultimately the law of God which reigns supreme. Consequently, as to disputes of heresy, the ruler is not entitled to obedience, nevertheless, as 'Ibāḍī discourses themselves demonstrate, it is very difficult to systematically distinguish between disputes of heresy and disputes of opinion. It is virtually impossible to depoliticize or objectify disputes of heresy.[1114] Moreover, even as to disputes of opinion or claims, the ruler is entitled to a presumption in his favor, however, this presumption is not irrebuttable or absolute. Therefore, 'Ibāḍī jurists argue that particularly in disputes involving life and physical integrity Muslims should act according to their conscience. Muslims should resist what they sincerely believe to be an injustice.[1115] As a general matter, Muslims should obey rulers and judges, and in most situations it is the rulers and judges who are directly responsible for any illegal commands that they may have issued. Therefore, in most situations, Muslims are not liable for executing the orders of a duly authorized ruler or judge. Nonetheless, even obedience to legitimate rulers and judges does not necessarily insulate Muslims from responsibility. In issues involving life and physical integrity, Muslims must rely on their conscience, and therefore, if someone obeys a superior order which he should have known is illegal, he might be held liable for executing the illegal order.[1116] On the other hand, if a Muslim resists what he believed to be an illegal order, he does so at his own risk. If it is subsequently decided that the order was, in fact, legal, and that the Muslim did not have a right to resist, such a Muslim will be held liable on this earth although he might not be blameworthy in the Hereafter because he relied on a sincere belief.[1117] On the other hand, if it is subsequently held that the order was illegal and resistance was justified, the resisting person will not be held liable for violating an illegal command.[1118] In essence, 'Ibāḍī jurists attempted to strike a balance between the need for order and stability, and the imperative of substantive justice. Nonetheless, since a Muslim acting on good conscience did so at his or her own risk, 'Ibāḍī jurists mitigated the nature of this dynamic by adopting the rules limiting the conduct of warfare against rebels. This, conceptually, guarded against rebellion becoming a zero-sum game. Rebels are afforded certain protections even if, in the final analysis, it is held that they did not have a right to rebel.

[1114] See al-Sa'dī, *Qāmūs al-Sharī'a*, vol. 9, 291, 319, 350-1; al-Warjalānī, *al-'Adl*, 46-7, argues that the dispute over the rulership of the Caliph 'Uthmān was one of religion and heresy. It was not a dispute of opinions or claims. To say the least, this is debatable.

[1115] Al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 717; al-Kindī, *al-Muṣannaf*, vol. 11, 267; al-Rustāqī, *Manhaj*, vol. 8, 40-1, 79.

[1116] Al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 598-600, 716-7, adds that the ruler and his soldiers are liable for issuing and executing illegal orders.

As noted above, 'Ibāḍī jurists insist that an illegitimate ruler should not be obeyed and must be removed. In fact, this is what 'Ibāḍī jurists often cite as one of the main distinguishing factors between them and other schools of thought.[1119] Despite the 'Ibāḍī ideological commitment to the rejection of illegitimate rulers, 'Ibāḍī jurists, like the jurists from other schools, engage in a balancing dynamic. An illegitimate ruler is one who came to power through usurpation and force, or one who was appointed by iniquitous people, or a ruler who insists on committing major sins including widespread injustice.[1120] Nonetheless, some 'Ibāḍī jurists argue that even if a ruler came to power through usurpation, it might not be necessary to remove him if his subsequent policies were just.[1121] However, even as to unjust rulers, 'Ibāḍī jurists do not impose an absolute duty to rebel. Rebellion is obligatory only if there is a reasonable chance of success, and only if the risks to the rebels and society are not prohibitively high. One should not rebel if rebellion, effectively, constitutes casting oneself into ruin. In all circumstances, one should balance the harm to himself and others with the expected benefit.[1122] Some 'Ibāḍī jurists assert that the pre-conditions for legitimating armed rebellion rarely exist. Therefore, armed rebellion in most circumstances is not justified.[1123] Most jurists, however, argue that it is permissible to assassinate unjust rulers as long as notice and warning is first provided to the oppressors. Some 'Ibāḍī jurists add that an unjust ruler may be assassinated only if he is responsible for the murder of people. Most 'Ibāḍī jurists assert that it is not permissible to assassinate the rank and file in the unjust ruler's army or police. Therefore, murder by stealth would not be allowed if directed at the ruler's soldiers.[1124] Some 'Ibāḍī jurists argue that if a particular soldier has killed someone, that particular soldier may be assassinated.[1125]

[1117] Ibid., vol. 14, 585, asserts that in the Hereafter, one is not liable if they relied on what one may reasonably rely on. On this earth, however, right or wrong is judged according to objective evidence which could be erroneous.

[1118] Ibid., vol. 14, 714, argues that if one relies on the advice of credible witnesses in supporting what turns out to be the wrong party, one is held liable on this earth but not in the Hereafter.

[1119] See Ibid., vol. 14, 311, 341; al-Kindī, *al-Muṣannaf*, vol. 10, 215; al-Sa'dī, *Qāmūs al-Sharī'a*, vol. 9, 279; al-Warjalānī, *al-'Adl*, 49; al-Rustāqī, *Manhaj*, vol. 8, 76.

[1120] Al-Kindī, *al-Muṣannaf*, vol. 10, 60, 73, 75-6; al-Rustāqī, *Manhaj*, vol. 8, 45.

[1121] Al-Kindī, *al-Muṣannaf*, vol. 10, 97.

If the use of force against unjust rulers is not possible, Muslims should exercise a variety of forms of non-cooperation.[1126] To the extent possible, Muslims should resist accepting government posts. They should avoid accepting judicial positions or even testifying in court. They should try to avoid paying taxes to the government and avoid providing other forms of support to the ruler's army.[1127] Nonetheless, all of these are not absolute prohibitions; they must be weighed in light of competing interests and values.

[1122] Al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 343, 763; al-Kindī, *al-Muṣannaf*, vol. 10, 51-2, vol. 11, 267; al-Sa'dī, *Qāmūs al-Sharī'a*, vol. 8, 104; al-Rustāqī, *Manhaj*, vol. 8, 78, 112.

[1123] Al-Warjalānī, *al-'Adl*, 49-51.

[1124] Al-Rustāqī, *Manhaj*, vol. 8, 107-9. Some jurists argue that if warning is provided, the ruler or the soldiers may be assassinated, see al-Kindī, *al-Muṣannaf*, vol. 10, 278.

[1125] Al-Kindī, *al-Muṣannaf*, vol. 11, 264-9.

[1126] See al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 339-440; al-Kindī, *al-Muṣannaf*, vol. 10, 296-303, details many forms of non-cooperation.

[1127] Al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 340; al-Warjalānī, *al-'Adl*, 50.

For instance, Muslims may assist an unjust ruler in waging *jihād* against non-Muslims, or even assist him in defending against an assault by another unjust ruler if their own homes or the homes of others are threatened.[1128] Furthermore, they may assist an unjust ruler in implementing certain laws if such laws are just, and they may accept official positions as long as they exercise great caution lest they commit an injustice. If threatened or forced, Muslims may practice all forms of dissimulation in order to avoid harm.[1129] They may refrain from criticizing the ruler's injustice, or may carry out illegal commands. A Muslim has greater discretion in exercising dissimulation in regards to disputes of opinion or claims. Dissimulation in matters where there is difference of opinion or disagreement is not as serious as dissimulation in matters considered essential for Islam. Dissimulation in matters that are central to the core of Islam or in issues that are clearly established in law is not proper unless under extreme forms of duress.[1130] However, under no circumstances may a Muslim practice dissimulation if it involves murder or serious physical injury, such as rape, to another person.[1131]

The 'Ibāḍī discourse, like the 'Imāmī and Zaydī discourse, engages in a negotiative dynamic with power. These discourses start out with general statements which uphold certain ideals – the ideals of order, stability and substantive justice. The ideals are weighed and balanced, and from this balancing process, certain conditions, exceptions and limitations are articulated. The discourse is negotiative because it does not uphold a certain ideal as absolute and unmitigated. There are absolute moral values, such as not assisting in the murder of an innocent person, but these moral values constitute the outer limits or external parameters of the discourse. Within the outer limits there is considerable room for negotiation and the weighing of competing considerations. The discourses are not dogmatic because they are not absolute, and they are negotiative because they are legalistic. Law is often forced to weigh competing considerations, and strike a balance between conflicting demands. Even the outer limits are difficult to define. As noted above, it is difficult to distinguish a dispute of heresy from a dispute of opinion. If one claims that there is a consensus that a certain ruler is just, and another challenges this consensus, does this become a dispute of heresy or opinion? In practice, even an attempt to define the outer limits is negotiative because it is forced to deal with challenges, objections and qualifications.[1132] Besides being negotiative, these discourses are also symbolic because they are designed to embarrass, shame, educate and praise. They identify certain conduct as acceptable, and other conduct as reprehensible. For example, when 'Ibāḍī jurists contend that the cutting down of the rebels' trees, the burning of the rebels' homes, and the pursuing of the fugitive are not among the practices of Muslims or is not what Muslims normally do[1133], they are not making a sociological observation. They are arguing that such conduct is not what a good Muslim should be comfortable with. Moreover, these jurists are not stating a rule prohibiting the conduct in question, rather they are raising a question as to the acceptability of such conduct. The symbolic aspect of the discourse acts as a moral commentary on how power dynamics are negotiated.

[1128] Al-Warjalānī, *al-'Adl*, 53; al-Kindī, *al-Muṣannaf*, vol. 11, 75-6, adds that Muslims may assist an unjust ruler fight a more unjust ruler. If Muslims do not know who is more unjust, they should not assist either side. See, also, al-Rustāqī, *Manhaj*, vol. 8, 104.

[1129] Al-Tamīmī, *Kitāb al-Nīl*, vol. 14, 337-8; al-Kindī, *al-Muṣannaf*, vol. 10, 273, 285-92.

[1130] Al-Warjalānī, *al-'Adl*, 49, 51-54.

[1131] Ibid., 55.

[1132] See the discussion in al-Sa'dī, *Qāmūs al-Sharī'a*, vol. 9, 260-2, 291, 319, 350-1. The author discusses various political conflicts in Oman and Yemen, and whether they are disputes involving conflicting claims and opinions or disputes of *bidā'*. He observes that these disputes are problematic because a consensus on the appointment or removal of a certain ruler will never exist.

[1133] Al-Rustāqī, *Manhaj*, vol. 8, 120; al-Kindī, *al-Muṣannaf*, vol. 11, 237, 243.

Legal Borrowing and the Negotiative Process

'Ibāḍī, 'Imāmī and Zaydī discourses affirm a high ideal: a legitimate ruler should be just, and only a legitimate ruler is owed obedience. Therefore, those who rebel against a just ruler are iniquitous because they violate their duty of obedience. Nonetheless, this forces a competing claim, and a truism. An unjust ruler could not be legitimate, and therefore, is not owed obedience, and those who rebel against him are not committing an error. Like the Sunnī jurists, the 'Ibāḍī, 'Imāmī and Zaydī jurists, realized that drawing the line between legitimacy and illegitimacy or between justice and injustice is a subtle and difficult matter. Consequently, they imposed rules of conduct that mitigate and limit the consequences of rebellion. Such rebellion could be a miscalculation or misjudgment as to the merits or chances of success, and such misjudgments should not result in absolute and draconian measures. Significantly, the Sunnī, 'Ibāḍī, 'Imāmī and Zaydī schools ended up articulating similar rules of conduct. This is partly due to the similarities in the dynamics surrounding the juridical culture of these various schools. However, one suspects that legal borrowing played a central role in the pervasiveness of the language and categories of *'aḥkām al-bughā*.[1134] For instance, the 'Ibāḍī school, on ideological grounds, does not refer to the precedent of 'Alī in constructing its rules of conduct. As discussed earlier, all the other schools agree that it is 'Alī's precedent which shaped the discourses of rebellion. Despite the fact that the 'Ibāḍī jurists do not cite 'Alī or his practices, they end up articulating the same rules of conduct prevalent in the other schools. Yet, 'Ibāḍī jurists insist that their doctrines are based on precedents set by their own *'imāms*. It is pointless to accuse any school of intentionally fabricating or projecting traditions in order to reach certain results. Nonetheless, the similarities between the 'Ibāḍīs and the other schools point to the pervasiveness of legal culture and legal borrowing, and to the creative, constructive and selective process which incorporates and legitimates such borrowing.

[1134] On the dynamics and interactions between the Shī'ī and Sunnī legal cultures, see Devin J. Stewart, *Islamic Legal Orthodoxy: Twelver Shiite Responses to the Sunni Legal System* (Salt Lake City: University of Utah Press, 1998). The author emphasizes the process of resistance and borrowing between the Shī'ī and Sunnī legal systems.

CONCLUSION

Technique is the art of the jurist. Technique is the specialized method by which the jurist expresses normative values, instrumentalist objectives, and functionalist goals. The methodology of the jurist is the product of a juristic culture which develops and legitimates a specialized method of discourse. The juristic culture, itself, reflects the cumulative institutional experiences and commitments of innumerable collaborators preserved in specialized books, continually reinforced and revived in the minds of the practitioners within that culture. The juristic culture is defined, somewhat, by unitary or uniform institutional and ideological commitments, but most of all it is defined by a specialized code, namely, a technical language. The technique of the jurist relies on language as its primary tool by which power is asserted, legitimated or challenged. Language is the main tool by which a jurist attempts to negotiate reality, produce domains of truth, and frustrate claims of truth or reality. Because of the centrality of language, it is imperative to examine the linguistic practice of the jurists. A meaningful understanding of the law, its functions or purposes must be based on a study of the details, or what some have called the microdiscourses, of the linguistic practice.[1135] It is primarily through the medium of language that juristic culture defines, perpetuates and reforms itself. As John Conley and William O'Barr argue, "First and foremost, the details of legal discourse matter because language is the essential mechanism through which the power of the law is realized, exercised, reproduced and occasionally challenged and subverted."[1136] Most importantly, the details of the linguistic practice are essential to understanding the creative act by which juristic culture responds to socio-political challenges and negotiates power dynamics.

[1135] John Conley and William O' Barr, *Just Words: Law, Language and Power* (Chicago: University of Chicago Press, 1998), 106. See, also, Brenda Danet, "Language in the Legal Process," *Law & Society Review* 14 (1980): 445-464; Judith N. Levi and Anne G. Walker, eds., *Language in the Judicial Process* (New York: Plenum Press, 1990); Calvin Morrill and Peter C. Facciola, "The Power of Language in Adjudication and Mediation: Institutional Contexts as Predictors of Social Evaluation," *Law & Social Inquiry* 17 (1992): 191-212. Also see the excellent study by Lloyd A. Fallers, *Law Without Precedent: Legal Ideas in Action in the Courts of Colonial Busoga* (Chicago: University of Chicago Press, 1969).

[1136] Conley and O'Barr, *Just Words*, 129.

The fact that Islamic law is divine in origin should not conceal the fact that it creatively responds to the socio-political dynamics of society placed within a specific historical context. Islamic law is influenced by the economic infrastructure, pressured by political demands, impacted by social considerations, and shaped and channeled by the text, but it is ultimately not fully determined by any of them.[1137] Law, and this is certainly true of Islamic law, is also molded by a corporate identity, and a common culture produced by and for the jurists. In this sense, law generally, and Islamic law specifically, is not autonomous but semi-autonomous.[1138] Islamic law is influenced by theological imperatives, and socio-political demands, but it is articulated, constructed and asserted by jurists that belong to a common, although not uniform, culture. This juristic culture constructs its own rituals, habits, paradigms and symbolism, and its own domains of truth. It also defines its own rules for acceptability, inclusion and exclusion. This does not mean that all legal doctrines are the product of the legal culture, or that they exist to serve the interests of the members of that culture. It does mean, however, that within specific historical contexts, legal culture expresses, promotes, challenges and undermines socio-political demands. At times, legal culture transmits and supports certain socio-political demands, but it also frustrates, dilutes and makes it possible to thwart them.

Law responds and acts sometimes through inertia.[1139] Once formed, legal culture does not necessarily respond efficiently to the demands placed upon it. Legal culture, with its inherited doctrines and truths, could become a habit that is difficult to alter or change. This is the influence of the accumulated precedents and rules of exclusion. This inertia gives law its stability, predictability, and appearance of immutability. In many ways, by failing to respond, law validates its own legitimacy, and at times, the legitimacy of the social and political institutions of society. However, it is dangerous to read too much into legal inertia, or to assume that the failure of the legal system to respond necessarily means that the juristic culture is legitimating the existing social or political institutions. At times, the legal system does not change because of the convenience of habit. Furthermore, the failure of the legal system to alter its inherited doctrines could be a form of protest against the dominant social or political practice. By insisting on a certain doctrinal ideal, the juristic culture could protest the dominant social or political practices.

[1137] This statement was inspired by Richard L. Abel, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994* (New York: Routledge, 1995), 523, who states, "[Law] is 'relatively autonomous,' influenced by economic infrastructure, pressured by political forces, and shaped by the social system, but not fully determined by any of them."

[1138] On the idea of relative or semi-autonomous law, see Isaac D. Balbus, "Commodity Form and Legal Form: An Essay on the Relative Autonomy of the Law," *Law & Society Review* 11 (Winter 1977): 571-587.

[1139] This position is represented by Alan Watson, *Society and Legal Change* (Edinburgh: Scottish Academic Press, 1977). See the critique of this position in Richard Abel, "Law as Lag: Inertia as a Social

The legal system often does eventually respond to socio-political realities and the dynamics of the juristic culture with a creative act. This creative act re-examines the inherited doctrines or paradigms, and selectively and imaginatively re-constructs the discourse or parts of the discourse. The creative act is not necessarily instrumentalist or functional; it does not necessarily aim at concrete and tangible results. It does not always aim to accomplish immediate changes in the way people go about their daily lives or in the way people resolve conflicts. Rather, the purposes of the creative process are negotiative, symbolic, clarifying, and at times, intentionally obfuscating. It often legitimates, aspires, educates, and protests. Importantly, the creative process is expressed primarily through the subtleties of language, and hence, unless one focuses on the details of the juridical linguistic practice, one would not be able to notice, much less appraise, the dynamics of the legal discourse. In fact, all claims about the nature or purpose of a legal system are highly

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Theory of Law," Michigan Law Review 80 (March, 1982): 785-809. On law and social change, and on the gap between law and society, see William Fielding Ogburn, *Social Change with Respect to Culture and Original Nature* (Gloucester, Mass.: P. Smith, 1964); Idem, *On Culture and Social Change: Selected Papers*, ed. Otis Dudley (Chicago: University of Chicago Press, 1964); William Graham Sumner, *Folkways: A Study of Sociological Importance of Usages, Manners, Customs, Mores and Morals* (New York: Dover Publications, 1959); Bernard Barber and Alex Inkeles, eds., *Stability and Social Change* (Boston: Little, Brown and Co., 1971). E. H. Levi, *Introduction to Legal Reasoning* (Chicago: University of Chicago Press, 1948), argues that the common law responds slowly to changing social values.

suspect unless grounded in a thorough understanding of the microlinguistic practices of the legal culture.[1140]

It is exactly because of the failure to examine the details of the linguistic practices of Muslim legal discourses that most contemporary commentators have adopted an erroneous view of the role of Muslim jurists. The traditional or accepted scholarly view tends to see Muslim jurists as conservative legitimists who simply rationalized the existing political order. According to this accepted scholarly view, Muslim jurists moved from the realm of political idealism to the absolute realm of political realism. Muslim jurists emptied the contract of the Caliphate of all moral content, and left only the factor of power operative in the juridical discourses. Therefore, Muslim jurists insisted upon an unchanged obligation of submission to the ruler. They sanctioned the authority of the usurper of power, and made obedience a moral, legal as well as religious obligation. Ultimately, according to the accepted scholarly view, Muslim jurists condemned all forms of civil strife, and fostered the belief that rebellion is the most heinous of all crimes. However, the accepted scholarly view achieves a very partial understanding of juristic discourse because it fails to focus on the details of the legal discourse -- the linguistic practice -- and analyze it in terms of the dynamics of power, legal culture and legitimation. It fails to examine the microdiscourses of the law, to look beyond its stated instrumental goals and to, instead, search for the creative process and its symbolic content. Consequently, the accepted view results in a starkly monochromatic or bipolar understanding of the juristic discourses: rulers must be either just or unjust; unjust rulers must either be obeyed or disobeyed; rebellion is either permitted or prohibited; and Muslim jurists were either activists or quietists.

Quite to the contrary, the dynamics engendered in the juristic discourses on rebellion and banditry reveal a far more complex process. Much earlier than the discourses of al-Ghazālī and 'Ibn Jamā'a, Muslim jurists accepted the functional necessity of obeying those in power. In principle, those in power should be obeyed. But that, in itself, is not remarkable for two reasons. First, legal systems, particularly pre-modern systems, often demanded an absolute duty of obedience, and mandated harsh penalties for rebels. At least from the point of view of normative legal injunctions, rebels were often seen as traitors, and normative law commonly showed little tolerance for those who defied the political order.[1141] Second and more importantly, as discussed earlier, legal culture inclines

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[1140] Paraphrased from Conley and O'Barr, *Just Words*, 130.

[1141] Article 2(1) of the Qing Code lists the plotting of rebellion as one of the ten great wrongs. Under article 255, no distinction is made between rebellion and treason. Article 254 provides that principals and accessories to the crimes of high treason and of plotting a rebellion will be put to death by slicing. Male relatives of the perpetrator who are over 16 years of age will be beheaded, and female relatives will be given to officers as slaves. Interestingly, article 210 provides that a military officer who is unkind to people, violates the rules, and pushes honorable people so far such that they rebel, will be beheaded. See, also, articles 2(9), 333, 334, 337(2). William C. Jones, trans., *The Great Qing Code* (Oxford: Clarendon Press, 1994), 35, 36, 67, 204, 237-9, 315.

S. C. Todd, *The Shape of Athenian Law* (Oxford: Clarendon Press, 1995), 141 n. 21, (treason punished by death, confiscation of property and prohibition of burial within Athenian sovereignty). However, Douglas M. MacDowell, *The Law in Classical Athens* (Ithaca: Cornell University Press, 1978), 176-7, argues that treason by attempting to overthrow the government was differentiated from an act of treason, which consisted of cooperating with a foreign power. On Roman law and political crimes, see Schisas, *Offences Against the State*, 3-15; MacMullen, *Enemies of the Roman Order*, 218; H.F. Jolowicz, *Historical Introduction to the Study of Roman Law*, 2nd ed. (Cambridge: Cambridge University Press, 1952), 325-6.

Maimonides in the *Mishneh Torah* dedicates a chapter to rebels. In this chapter, the punishments of execution by strangulation and flagellation are mandated for rebellious elders who defy or resist the rulings of the Supreme Court, and advocate contrary opinions to the positions of the Supreme Court; see Moses Maimonides, *The Code of Maimonides: The Book of Judges*, trans. Abraham M. Hershman (New Haven: Yale University Press, 1977), 138-150. The justification for the punishments is "in order that strife may not increase in Israel," Ibid., 144. Maimonides does not address armed rebellion, however, by implication, it is doubtful that it would be tolerated. Also see Boaz Cohen, *Jewish and Roman Law: A Comparative Study* (New York: The Jewish Theological Seminary of America, 1966), vol. 1, 69-70, n. 28.

Katherine Fisher Drew, trans., *The Lombard Laws* (Philadelphia: University of Pennsylvania Press, 1973). (The Edict of Laws issued by King Rothair in 643. Law One specifies that a person who conspires or gives counsel against the life of the king shall be killed and his property confiscated. Law Six provides that anyone who revolts while on a campaign or who raises a revolt in any part of the army shall be killed.) Schild, "History of Criminal Law and Procedure," in Fosberry, *Criminal Justice*, 130. (treason in the Frankish period and the Middle Ages included breach of loyalty owed the king. Treason was later extended to include conspiracy and rebellion against the national sovereign and the city councils. Treason was punishable by hanging, drowning, beheading, burning, breaking on the wheel or quartering.)

The *Constitutio Criminalis Carolina* promulgated by the Holy Roman Emperor Charles V in 1532 proscribed the death penalty for treason. High treason, which included the assassination or attempted murder of a sovereign, was punished by quartering. The Prussian General Law Code of 1794 punished lesser forms of treason by decapitation. High treason was punished by "dragging the perpetrator to the scaffold wrapped in an oxhide as well as broken with the wheel from the bottom up." See Richard J. Evans, *Rituals of Retribution: Capital Punishment in Germany 1600-1987* (Oxford: Oxford University Press, 1996), 29-31, 134.

Rupert D.H. Bursell, *Liturgy, Order and the Law* (Oxford: Clarendon Press, 1996), 201, n. 25. (those executed for high treason may not be admitted to Christian burial). James Viscount Staire, *The Institutions of the Law of Scotland*, ed. David M. Walker (Edinburgh: University of Edinburgh Press, 1981). (Laws and customs of Scotland as collected and published by Stair in 1681. Open rebellion and towards order and stability, and a context in which conflicts may be peacefully resolved. However, this propensity or inclination is not absolute because it functions within the power dynamics of the legal culture and the state. In other words, the emphasis on order and stability is only one of the negotiative powers at the disposal of a legal culture. If a juridical culture emphasizes a singular and unwavering obligation to obey and submit to a political order, it compromises its own negotiative power and may compromise its own legitimacy.

Arising out of the context of persistent early 'Alid rebellions, Muslim jurists argued that a just ruler should be obeyed, but those who rebel are not dissolute or evil. Muslim jurists co-opted the early theological discourses concerning the conflicts between the companions of the Prophet in order to legitimate the construction of *'aḥkām al-bughā*. Pursuant to this discourse, Muslim jurists asserted that rebels are entitled to a certain

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bearing arms against the King is treason, pp. 955-6. The penalty for treason is forfeiture of life, lands and goods, p. 640.)

Under the *Glanvill*, the crime of *lese-majeste* included: the killing or betrayal of the king or the kingdom or army, the breach of the king's peace, homicide, arson, robbery, rape and certain types of falsifications (e.g. falsifying the royal charter). All such crimes are punishable by death or the cutting off of limbs, Ranulf de Glanvill, *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill*, ed. and trans. G.D.G. Hall, (Oxford: Clarendon Press, 1993), 3, 176-7. Also see Hudson, *The Formation of the English*, 161. On the trial of those accused of sedition or plotting against the king in England, see Glanvill, *The Glanvill Treatise*, 171-3. For an earlier time period, see Edward J. White, *Legal Antiquities: A Collection of Essays Upon Ancient Laws and Customs* (London: Thomas Law Book Co., 1913), 115-6, addressing the procedure after the Norman invasion of England in 1066.

V.A.C. Gatrell, *The Hanging Tree: Execution and the English People 1770-1868* (Oxford: Oxford University Press, 1994), 281, (notes that until the 1790's, in England an aggravated punishment applied to traitors. Such punishment often included hanging and disembowellment). Thomas Pitt Taswell-Langmead, *English Constitutional History From the Teutonic Conquest to the Present Time*, ed. Theodore F. T. Plucknett. 10th ed. (London: Houghton Miflin co., 1946), 573-584, (crime of treason at the time of Edward III (r. 1327-1377) was vague and ambiguous. Any breach of allegiance to the king was treason which could lead to, among other things, forfeiture of life and property. The statute 25 Edw. III, st. 5, c. 2 (1352) was passed to clarify the ambiguities. Under the statute, levying war against the king, either directly against his person or constructively against his government, is treason. Hence, every insurrection which in the judgment of law is intended against the king, either to dethrone or imprison him, or to oblige him to alter his measures of government, or to remove evil counselors -- although not conducted with military array -- has been held to be a levying of war.) However, the beneficiaries of the limitation of the ambiguities of the 1352 statute were the mesne lords, see J.G. Bellamy, *The Law of Treason in England in the Later Middle Ages* (Cambridge: Cambridge University Press, 1970), 87. On 25 Edw. c. 2, also see William Blackstone, *Commentaries on the Laws of England* (Chicago: University of Chicago Press, 1979), vol. 4, 74-5, and Theodore F.T. Plucknett, *A Concise History of the Common Law*, 5th ed. (New York: Little, Brown and Co., 1956), 443. On King Richard II, Edward III's successor, and the attempt to expand the treason laws to cover any opposition to the king, see Goldwin Smith, *A Constitutional and Legal History of England* (New York: Dorset Press, 1990), 203.

benevolent treatment. The traditions regarding 'Alī's conduct were co-opted in support of the various technical rules of conduct enunciated by the jurists. There is no doubt that the collective memory of Muslims recalled that 'Alī treated rebels with a certain degree of benevolence. I am not claiming that Muslim jurists invented the traditions describing 'Alī's conduct. However, as we saw, there were various competing traditions and trends regarding the conduct of Abū Bakr, 'Uthmān, and Mu'āwiya. Even more, there were competing traditions regarding the Prophet's conduct with the people of 'Urayyna, regarding 'Alī's treatment of rebels, and regarding the fate of people such as 'Alī's assassinator Ibn Muljim. The creative juridical act comes in constructing what is remembered and how it is remembered, and on the doctrinal impact that such a memory will exercise on the legal discourses.[1142] For instance, as we saw, there were several conflicting positions represented in the traditions of the Prophet in regards to obedience to authority. Some traditions emphasized obedience to God, and the duty to reject any illegal command by a ruler. Other traditions emphasized the obligation to obey the ruler, and even called for the execution of any rebels. In the context of *'aḥkām al-bughā,* Muslim jurists reconstructed and synthesized these traditions by arguing that the traditions condemning rebellion apply only to those who rebel without a plausible interpretation or cause. Furthermore, only those who rebel without a plausible interpretation or cause may be persecuted or executed.

Muslim jurists insisted that the articulated rules of *'aḥkām al-bughā* are binding whether a ruler is just or unjust. If the rebels relied on a plausible interpretation or cause, they were not to be equated with common criminals.[1143] Muslim jurists responded to the political challenges posed by the early ʿAlid rebellions and rebellions of people such as Ibn al-Zubayr with legalities. As discussed, within the context of a juridical culture, that is hardly surprising. However, legalities are not irrelevant or merely pedantic; the practice of legalities is the language of jurists, and like all discourses, it aims to express and challenge, transmit and undermine. Like all discourses, legalities have an undeniable symbolic quality. Whether the state would give effect to or implement the injunctions of the jurists or not, the state could not deny the jurists the power to embarrass, shame and castigate. *'Aḥkām al-bughā* would stand as a technical and symbolic commentary on the dynamics of power and the practices of the state.

[1142] Norman Calder has emphasized the creative, dialectical and redactive process by which Islamic law has developed. I agree that the process is creative and often dialectical. But I think Calder exaggerates the role of redactiveness and invention in Islamic legal history. See Calder, *Studies*, esp. 19, 198-222, 244-7.

[1143] De-criminalizing rebellion or subversion is unusual in legal systems. Often, rebellion is equated to an act of treason and dealt with as a serious crime. See cites in Ibid., and see Thomas Eskine Holland, *The Elements of Jurisprudence*, 13th ed. (Oxford: Clarendon Press, 1924), 382 (acts tending to the subversion of the government, such as the assassination of princes, rebellion and similar acts of High Treason are described as criminal offenses. Furthermore, riots and other offenses against public order and tranquillity

Confronted by an absolute claim to power, Muslim jurists responded by a creative and negotiative act. They constructed the doctrines of rebellion and created an interpretive

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and resistance or disobedience to lawful authority are criminal as well). William Geldart, *Introduction to English Law*, revised by David Yardley (Oxford: Oxford University Press, 1995), 181-2, (under the Treason Act of 1352, high treason includes imagining the King's death, levying war against the King in his realm, and adhering to the King's enemies in his realm, giving them aid or comfort in the realm or elsewhere). Frank McLynn, *Crime and Punishment in Eighteenth-Century England* (Oxford: Oxford University Press, 1991), 336-7 (under the 1795 Treasonable Practices Act introduced by William Pitt, inciting hatred or contempt toward the king, constitution or government was an act of treason punishable by death). On the seditious speech and its relation to "compassing the king's death," see Bellamy, *The Law of Treason*, 119-20.

Treason and its relation to rebellion and disloyalty towards the sovereign is typically vague. A nineteenth-century legal historian summed up the vagueness of the crime of treason by stating: "treason is a crime which has a vague circumference and more than one centre," F. Maitland and F. Pollock, *The History of English Law Before the Time of Edward I* (Cambridge: Cambridge University Press, 1895), vol. 2, 503. In English law, treason was often seen as a betrayal or violation of allegiance to a superior. See Plucknett, *A Concise History*, 536. For example, Blackstone, *Commentaries*, vol. 4, 75, states, "[T]reason is indeed a general appellation, made use of by the law, to denote not only offences against the king and government, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior...and the inferior so abuses that confidence...as to destroy the life of any such his superior or lord." J. A. Sharpe, *Judicial Punishment in England* (London: Faber and Faber, 1990), 27, (under 16th century English law, the murder of a master by his servant is an act of treason punishable by death.) See, also, R. J. Walker and M. G. Walker, *The English Legal System*, 2nd ed. (London: Butterworths, 1970), 66-7. On the history of the crime of treason in English law, the categories which the crime covered, and the relation of treason to the religious turmoils in England, see F. W. Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1946), 2, 148, 227, 229, 514. The commons in the parliament of 1429-30 successfully petitioned for the law of treason to be extended to include arson. See Bellamy, *The Law of Treason*, 131. In the German legal tradition of the Middle Ages, treason was not limited to political crimes, but also covered treachery and betrayal; see Schild, "History of Criminal Law and Procedure," in Fosberry, *Criminal Justice*, 129. On the law of treason in Italy, France and England, see S.H. Cuttler, *The Law of Treason and Treason Trials in Later Medieval France* (Cambridge: Cambridge University Press, 1981); Kate Lowe, "The Political Crime of Conspiracy in Fifteenth and Sixteenth Century France," in *Crime, Society and the Law in Renaissance Italy*, ed. Dean and Lowe, 184-203; Lacey Baldwin Smith, *Treason in Tudor England: Politics and Paranoia* (Princeton: Princeton University Press, 1986); John Bellamy, *The Tudor Law of Treason* (London: Routledge and Kegan Paul, 1979).

process that legitimated and authenticated these doctrines. The jurists refused to completely withdraw support from the state which, in turn, legitimated and supported their institutional roles as judges and teachers. However, the jurists' main loyalty was to the legal order, and not necessarily to the political order. If rebels were denied any legitimacy or demonized, that would politicize the legal order, and give it the appearance of impartiality. Because of the fact that their loyalty was primarily to the legal order, and not the political system, Muslim jurists argued that rebellion could be the result of a plausible interpretation or cause, but an interpretation that was considered as a matter of law to be in error. This played the dual function of preserving the appearance of impartiality of the legal order, and hence its legitimacy, and acting to temper the legitimacy of the political order against its foes. This creative response by the juristic culture was negotiative because it engaged in and bargained with the doctrinal sources of Islam and the institutions of power.

The negotiative and creative dynamics of the discourses on rebellion are also demonstrated in the juristic debates on banditry, and the liability of the rebels. As discussed earlier, the Qur'ānic verse on causing corruption on the earth and fighting God and His Prophet played a prominent role in the discourses on rebellion. There is evidence that the 'Umayyads and early 'Abbāsids attempted to invoke this verse against rebels, and hence, justify mutilating and crucifying rebels. Muslim jurists insisted that the *ḥirāba* verse was unrelated to rebellion, and that it applied to the crime of banditry. Muslim jurists argued that bandits terrorize people and victimize the helpless, and that is what is meant by the Qur'ānic expression "those who fight God and His Prophet and cause corruption on the earth." Rebels who rely on a plausible interpretation or cause do not necessarily cause corruption on earth, or fight God and His Prophet. This, of course, is a legal construct or fiction, but it is as much of a fiction as claiming that rebels do, in fact, cause corruption or fight God and His Prophet. It depends on how one defines concepts such as causing corruption on the earth, and fighting God or the Prophet.

Often, definitions require re-definitions. The same negotiative and creative process which produces a definition, through an interactive and perhaps, dialectical dynamic, will often produce a re-definition. Various demands are placed on any definition, and if any definition is to remain viable and dynamic, often it will have to interact and respond to these demands. One of these demands is the demand of legitimacy; in order for a definition to remain persuasive, it is often forced to respond to a need for legitimacy produced by social, cultural or political dynamics, or importantly, by the dynamics of the legal culture. One suspects that in proportion to the intensity of the demands will be the extent of the re-definition. However, socio-political demands must still be filtered through the prism of legal culture which generates its own logic and demands. As discussed earlier, legal culture does not always respond efficiently or immediately. How fast or to what extent a legal culture responds depends on a variety of factors including the institutional structure, the cohesiveness and the age of the culture. Importantly, one of the factors is to what extent the re-definition can be rooted in the established discourses within that legal culture.

The challenge produced to the discourses of the jurists was the increased dynastic and tribal fighting with the weakening of the 'Abbāsid Empire, and the conduct of various historical groups who relied on banditry as a means of propagating their ends. Historical and legal sources indicate that there was considerable social turmoil caused by groups such as the Qarāmiṭa. Muslim jurists responded by a creative refinement and re-definition. They debated whether rebels who pursued indiscriminate and terrorizing methods may be qualified as *bughā*. Furthermore, many jurists excluded certain acts of terror, such as rape, murder by stealth and the poisoning of water sources, from the coverage of *'aḥkām al-bughā*, and treated such crimes as acts of corruption on the earth. Consequently, if rebels committed such acts, they would be held liable under the law of banditry or the common law of crimes. Additionally, many jurists reconstructed the rules of liability under the law of rebellion. Under this reconstruction, rebels are not liable for life and property damaged in the course of the rebellion, only if such destruction was incidental and necessary to the rebellion. Hence, certain conduct, such as rape, could be considered unrelated or unnecessary to the rebellion, and excluded from the coverage of *'aḥkām al-bughā*. Ultimately, these juristic creative acts responded to some of the rhetorical consequences of *'aḥkām al-bughā*, and simultaneously, defended the legitimacy of the discourses on rebellion. If the juristic discourses persistently legitimated or excused problematic social and political practices, the legitimacy of the juristic doctrines could itself be rendered problematic. By excluding certain particularly offensive conduct from the protection of *'aḥkām al-bughā*, Muslim jurists upheld the credibility and legitimacy of this field of law.

By the 6th/12th century, the juridical discourses on rebellion had become widely and firmly established in the juristic culture. As discussed earlier, even the reluctant borrowers such as the Mālikīs and 'Imāmīs eventually fully adopted the symbolism, linguistic practices and technicalities of the field. Significantly, one finds the same linguistic practice or substantial fragments of the linguistic practice in 'Ismā'īlī, 'Ibāḍī and Zaydī juristic discourses. These various schools have diverse theological paradigms, and yet, one finds that their linguistic practice was quite similar to the Sunnī tradition. This is powerful evidence of the impact and influence of legal culture, and predominance of legal borrowing. Moreover, the discourses on rebellion engaged the non-Sunnī schools in the definitional dynamics of identifying and categorizing who are the *bughā*, and consequently, into their own symbolic and negotiative processes.

As the doctrines of *'aḥkām al-bughā* became firmly established, the linguistic practices and formulas of the field were consistently repeated in Sunnī and non-Sunnī discourses. Often, the consistent repetition of legal formulas is the product of an inherited practice and habit in a legal culture, and therefore, it is difficult to assess the negotiative and symbolic quality of the discourses after such discourses have become widespread and common. Nevertheless, as argued earlier, often a juridical culture responds to social or political realities long after those realities have come into existence. Therefore, some of the reforms limiting the non-liability of rebels were not fully asserted until the 6th/12th century.

There is considerable evidence that even after the discourses on rebellion had become firmly established, the legitimating, negotiative and symbolic dynamics of these discourses continued. Importantly, far from simply legitimating or sanctioning the realities of power, Muslim jurists continued to engage, negotiate, undermine and thwart power.

While many of the early discourses on rebellion focused on what one might call the depoliticization of the doctrines of rebellion, the Sunnī revisionist trend repoliticized substantial aspects of the discourse. By depoliticization, I do not mean that the discourses on rebellion were apolitical or not intended to engage and negotiate with the political. Rather, depoliticization, in this context, means that early Muslim jurists focused on the technicalities of the treatment to be afforded to rebels. These technicalities were formalized and objectified as to give the appearance of impartiality. This was embodied in the notion that whether the ruler is just or unjust, the interpretation of the rebels, as a legal matter, is presumed to be erroneous, and whether the ruler is just or unjust, he is bound by rules of conduct enunciated in *'aḥkām al-bughā*. Regardless of the substantive quality of the rebels, the ruler is presumed to be right, and regardless of the substantive quality of the ruler, he is bound by the law. This construct was hardly apolitical, but it attempted to remove the focus away from the ideological to the legal and technical. The Sunnī revisionist trend, however, re-introduced several ideological and unabashedly symbolic elements into the discourse.

The revisionist trend reformulated a variety of doctrines. Some jurists, particularly Mālikī, argued that those who rebel against an unjust ruler are conclusively presumed to have an interpretation or cause. Others argued that rebels should not be held liable even if they do not rely on an interpretation or cause. The main emphasis of the revisionist trend was not on justifying rebellion, but on withdrawing support from unjust rulers. Therefore, it was argued that Muslims should not assist unjust rulers in fighting rebels. Importantly, a right of self-defense, of sorts, was recognized by arguing that those who are responding to an injustice inflicted upon them are not rebels at all. As argued earlier, the process of defining who is legitimately responding to an inflicted injustice, as opposed to aggressively waging an unjustified rebellion, involves its own negotiative and symbolic dynamic. Furthermore and remarkably, both the Sunnī revisionist trend and the non-Sunnī schools turned the ominous accusation of banditry against those in power. Pursuant to this logic, it is possible for the ruler or his agents to act as the equivalent of bandits if they terrorize and victimize. Whether the jurists had the enforcement mechanism to punish the rulers or his agents for acts of banditry was largely irrelevant. The point was largely symbolic -- it was a form of denunciation and disapprobation, and a form of rhetorical threat. It is somewhat ironic, but entirely logical, that the discourse concerning the causing of corruption on earth and the fighting of God and His Prophet, was turned on its head and employed against the state.

The intellectual history revealed by examining the linguistic practice of the jurists, and placing this practice within the power dynamics of the juristic culture, is rich and multi-layered. It defies extreme or essentialist characterizations. As Richard Abel observes, "extreme positions ... quickly founder on uncomfortable facts." [1144] One of the uncomfortable facts challenging any simplistic or essentialist characterization of the Islamic juristic culture and its relation to political power is found in the linguistic practices of *'aḥkām al-bughā*. One suspects that if particular linguistic practices are examined in the context of specific historical incidents, one will gain greater insight into the micro-dynamics of the juristic culture and its relation to power. This is bound to yield more accurate generalizations about the role played by the Islamic discourses on rebellion. At the doctrinal level, the Muslim juridical debates suggest a complex process that is inadequately explained by the contemporary scholarly discourses on quietism versus activism. For example, even as to the ultimate question of whether one should rebel against an unjust government, Muslim jurists gave a complex but succinct response summarized in the expression "it depends." The question as to whether one should rebel against an unjust government is too simplistic, general and vague such that it would only warrant either a highly dogmatic or a highly conditional response. Muslim jurists, for the most part, responded by arguing that on the one hand, rulers carry the burden of protecting Islam, but, on the other hand, one cannot obey a superior if it means disobeying God. On the one hand, order and stability is necessary, but, on the other hand, God commanded justice, and God's law must reign supreme. On the one hand, one should avoid pointless violence, but, on the other hand, if the rebels have a reasonable chance of success, then perhaps rebellion would be justified. This results in a balance-of-evils test in which the good is weighed against the harm. This could be pragmatic and utilitarian, but it is also the same test which provided a *de facto* acceptance of the authority of the usurper and the unjust. In other words, it is a double-edged sword which, theoretically, may be used for or against the state. Importantly, it is a functional and pragmatic test placed in the context of the principled parameters of *'aḥkām al-bughā*. The same process can be observed in the non-Sunnī discourses on rebellion. It is suggestive that the Shī'ī and 'Ibāḍī juristic discourses, despite the fact that they arise from very different theological paradigms, resorted to a substantially similar balancing test. According to Shī'ī and 'Ibāḍī discourses, rebellion against injustice is not an absolute value -- as an imperative it must yield to the pragmatic considerations of social and personal harm weighed against the anticipated benefits. I am not arguing that the linguistic practices of the non-Sunnī schools are identical to the Sunnī discourses, and I am not arguing that the balancing test is value-neutral. I am arguing that the Sunnī and non-Sunnī juridical cultures responded in similar ways because of the similarities in the paradigms of the juristic culture. This point is well-illustrated by a report mentioned earlier in this study and which is often cited in Sunnī, Shī'ī and 'Ibāḍī discourses. According to this report, a military commander ordered some of his troops to jump into a fire. The troops refused to carry out the order. Upon hearing about the incident, the Prophet informed the troops that they exercised proper judgment, and, in fact, if they would have complied with the order, God would have punished them with Hellfire.

[1144] Abel, *Politics*, 523.

What is the import of this tradition? Arguably, it means that one should not obey an illegal command. However, one could slightly vary the facts of the report, and end up with a conditional response. One can assume that the Prophet is dead, and that the commander, whose probity and piety is in contention, orders some of his troops to jump into a swamp. Should the troops obey? Should they fight the commander's loyalists, and attempt to take command? Effectively, the response given by Muslim jurists to this hypothetical is that the questions as posed are too vague, and one would have to answer such questions with the phrase "it depends."

Within the discourses on rebellion, not all concepts or ideas were rendered subject to a balancing or pragmatic test. The parameters of *'aḥkām al-bughā* were asserted as absolutes. For instance, it was argued that rebels may not be tortured or mutilated, and that rebels may not be executed after the fighting ends. Nonetheless, within the absolutist parameters there remained a substantial creative and negotiative power retained by the jurists, and that is the power of definition. This power was asserted well into the modern age, but this power was not necessarily asserted precisely or clearly. It was often suggestive, confounding, and obfuscating. For example, the Ḥanafī jurist Ibn 'Ābidīn (d. 1252/1836-7) dealt with the Wahhābī rebellions against the Ottoman Empire in the 19th century.[1145] He describes the Wahhābīs as the Khawārij of the modern age, and strongly condemns the fact that the Wahhābīs claimed to be the true representatives of Islam, and that they called their opponents unbelievers. He also condemns the fact that the Wahhābīs slaughtered many Muslims, and attacked the jurists of Islam. Clearly, Ibn Ābidīn strongly disapproved of the movement and its practices. Significantly, by comparing them to the Khawārij and emphasizing their indiscriminate means of slaughter, Ibn 'Ābidīn implies that the Wahhābīs should not be treated as *bughā*. Yet, as a matter of principle and precedent, he is unwilling to make this categorization explicit. In fact, he is careful to note that the majority of jurists considered the Khawārij *bughā*. Nevertheless, he does not explicitly describe the Wahhābīs as *bughā*. Rather, he explicitly rejoices at the fact that they were defeated by Muḥammad 'Alī Pashā (d. 1265/1849) in 1234/1818, and describes their defeat as a blessing from God.[1146] Importantly, Ibn 'Ābidīn does not comment on the fact that 'Abd 'Allāh, the leader of the Wahhābīs at the time, was captured and beheaded in Constantinople in 1818. This case tested the applicability of the discourses on rebellion to a specific context. However, while sustaining the integrity and cohesiveness of the doctrines of rebellion, Ibn 'Ābidīn is, one suspects, intentionally ambiguous about the applicability of the doctrines to a problematic contemporaneous case.

[1145] Followers of the puritanical teachings of Muḥammad b. 'Abd al-Wahhāb (d. 1206/1792). Many of his teachings still pervade Saudi Arabia today. See Gibb and Kraemers, *Shorter Encyclopedia of Islam*, 618-21.

A different example demonstrating the dynamics and subtleties of the juristic discourse on the permissibility of rebellion and the definition of *bughā*, is found in the *responsa* of the Mālikī jurist al-Shaykh 'Ulaysh (d. 1299/1882). In this example, the technicalities and particulars of the law replace the need for clear definitions by providing for clear results. In various *responsa* dealing with the theoretical and historical aspects of the discourse on the *bughā*, 'Ulaysh repeats many of the inherited doctrines on rebellion. He reiterates that those who fight while relying on an interpretation are not to be held liable for life or property destroyed during the course of rebellion. Furthermore, he states that rebels, including groups such as the Khawārij, may not be mutilated, and funeral prayers should be performed on their dead. 'Ulaysh's language and tone is technical and detached; he conveys the impression that the doctrines of rebellion are immutable and absolute. Therefore, he suggests that al-Ḥusayn, 'Alī's grandson, despite his virtues, was the *baghī* in relation to Yazīd because Yazīd was the ruler in power. Nevetheless, reciting many of Yazīd's indiscretions, he argues that Yazīd was iniquitous while al-Ḥusayn was pious. He contends that the conflict between al-Ḥusayn and Yazīd was one that involved competing interpretations, although al-Ḥusayn was the more pious party.[1147] This, however, does not seem to alter the fact that al-Ḥusayn is categorized as a rebel, and Yazīd as a ruler.

[1146] Ibn Ābidīn, *Ḥāshiyat Radd*, vol. 6, 413.

'Ulaysh's construct is solid, technical and unequivocal. Nevertheless, this construct does not deny him the negotiative power that may be found in the details of the juristic linguistic practice. In a separate *responsa*, 'Abd al-Qādir b. Muḥyyī al-Dīn al-Jazā'irī (d. 1300/1883), a leader of the Algerian resistance, presented 'Ulaysh with an issue involving the practical application of the discourses on rebellion. 'Abd al-Qādir explained that since the French invaded Algeria, 'Abd al-Qādir had led the resistance against the French. However, he was betrayed by al-Sulṭān 'Abd al-Raḥmān b. Hishām (r. 1238/1822 - 1276/1859) who signed a treaty with the French, and cut off 'Abd al-Qādir's supply of food and weapons. 'Abd al-Qādir's main concern is to solicit 'Ulaysh's support against the Sulṭān. 'Abd al-Qādir asks: Despite of the fact that the Sulṭān is a Muslim ruler, is it permissible to fight him because of his cooperation with the French? 'Ulaysh responds by asserting that all jurists have agreed that Muslims have a right to defend their life and property, and that no one, including a ruler, may deny Muslims such a right. 'Ulaysh suggests that it is the Sulṭān who is behaving like a *bāghī* because he is transgressing the bounds of acceptable Islamic conduct. While it is true that a ruler is entitled to obedience, a ruler cannot be obeyed if such a ruler commands a sin, and the Sulṭān has commanded a sin when he ordered Muslims to stop fighting the French. Therefore, 'Ulaysh concludes that 'Abd al-Qādir may fight the Sulṭān, and in fact, if the Sulṭān attempts to send an army to attack 'Abd al-Qādir, it becomes mandatory upon 'Abd al-Qādir and his troops to defend themselves and fight the Sulṭān. Even more, those who die resisting the Sulṭān are martyrs.[1148]

[1147] Abū 'Abd Allāh al-Shaykh Muḥammad 'Aḥmad 'Ulaysh, *Fatḥ al-'Aly al-Mālik fī al-Fatāwā 'alā madhhab al-Imām Mālik* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1958), vol. 2, 339, 350-3.

[1148] Ibid., vol. 1, 387-92.

Clearly, ʻUlaysh is not willing to concede any degree of credibility to the Sulṭān's appeasement of the French, and his sympathies towards ʻAbd al-Qādir are apparent. ʻUlaysh does not wish to describe ʻAbd al-Qādir as a *baghi* or a rebel because of the implicit reprobation that this might entail. He is also not willing to unequivocally categorize the Sulṭān as *bāghī* because this might constitute an implicit approbation of the Sulṭān. Arguably, if the Sulṭān is the *bāghī*, then his conflict with ʻAbd al-Qādir is a matter of competing interpretations and different points of view. ʻUlaysh obfuscates the issue of definitions, and proceeds to reach a result through the application of the details. ʻUlaysh affirms the general principle that rulers should be obeyed, but the principle is largely inapposite. ʻAbd al-Qādir, ʻUlaysh concludes, is acting in self-defense. Even if the Sulṭān is only disabling ʻAbd al-Qādir from defending himself against the French, that is sufficient to legitimate fighting the Sulṭān. Of course, ʻUlaysh did not invent this discoursive dynamic, because the idea that those who act in self-defense against an unjust ruler are not *bughā* was already firmly established in the Sunnī revisionist trend. ʻUlaysh's contribution was in employing the doctrinal details in order to negotiate a specific result within the parameters of the inherited discourses of the juristic culture. ʻUlaysh, himself, who served for a long time as a professor at the Azhar University in Egypt, died in prison after being accused of supporting ʻUrābī's rebellion against the French in 1299/1882.[1149]

The dynamics of a legal process produces an enormous amount of factual and discoursive detail. The details produced respond to a vast array of considerations, but such details impact upon these considerations imperfectly, and in a complex and highly varied fashion. The enormity of the factual detail often does not yield to abstract generalizations. In fact, there is a sufficient amount of factual detail in the discourses on *'aḥkām al-bughā* so as to discourage generalized abstractions. This, however, does not mean that one should eschew all generalizations, but only that generalizations must be analyzed in light of the historical dynamics of law and society. As Abel states, "Historical interpretation must complement and often displace sociological generalizations."[1150] Analyzing the details of the intellectual history of *'aḥkām al-bughā*, one finds a dynamic creative and negotiative process, but can one generalize from this analysis that such a process is inherent and inevitable? For instance, will the creative and negotiative process necessarily continue in the discourses on rebellion in the contemporary age? Arguably, there is a sufficient rupture between the juristic culture of pre-colonial and post-colonial Islam so as to make any generalizations about the former not necessarily applicable to the latter.[1151] Even the dynamics played out in the late Ottoman period and in the age of colonialism might not be relevant to the age of nation states. Arguably, the Muslim juristic culture in the age of nation states is capable of less independence, and therefore, its negotiative and creative power is heavily constrained.

[1149] See al-Ziriklī, *al-'Aʻlām*, vol. 6, 19-20. After fighting the French for fifteen years, ʻAbd al-Qādir, partly due to the Sulṭān's cooperation with the French, was defeated. After surrendering, ʻAbd al-Qādir apparently cooperated with the French, was given a pension, and died in exile in Damascus. See al-Ziriklī, *al-'Aʻlām*, vol. 4, 45-6.

I do agree that the dynamics of Islamic law in the contemporary age are considerably different than the dynamics of the pre-modern age. But while I do think that Islamic law in the contemporary age has not exhibited much creativity or originality, it is premature to come to any conclusions about the role that *'aḥkām al-bughā* will play in the contemporary age. At the symbolic and ideological level, the juristic discourses on *'aḥkām al-bughā* are extremely relevant to the contemporary age in various ways. For example, the notion that even violent rebels are *mujtahids*, of sorts, or that people have a right to self-defense against a perceived unjust ruler might aid in reconstructing Islamic theories of government, and might challenge absolutist conceptions of power. Furthermore, the idea that rebels should not be executed or mutilated might limit the pragmatism and opportunism of politics. *'Aḥkām al-bughā* might set moral and legal limits on power conflicts, and temper the legitimacy of the savagery that a government may visit upon its opponents. Even more, as discussed earlier, Muslim jurists often cited "causing terror or terrorizing" as one of the elements of the crime of banditry. This has an obvious relevance to contemporary discourses on terrorism.[1152] Of course, there is the very real risk that a government would accuse its opponents of committing the crime of *ḥirāba* (terror) and corruption on earth, and treat them as such. However, the pre-modern juristic discourses on *ḥirāba* and *baghy* are material in developing a coherent and systematic distinction between terrorism and rebellion. Finally, the conceptualization of certain forms of sexual assault as a crime of terror or as a form of terrorism is significant for the gender dynamics within a Muslim society at the rhetorical, symbolic and functional levels. For instance, the notable jurist and reformer Rashīd Riḍā (d. 1353-4/1935) argued that rape or abduction for the purposes of obtaining a ransom is a form of *ḥirāba*, and should be treated as such.[1153]

[1150] Abel, *Politics*, 545.

[1151] See Tamara Sonn, "Irregular Warfare and Terrorism in Islam: Asking the Right Questions," in *Cross, Crescent and Sword*, ed. Johnson and Kelsay, 130-3. I should note that I find the analysis of the author unpersuasive at many levels. Most importantly, she bases her analysis on the assumption that rebellion has been unequivocally condemned throughout Islamic history. This assumption is not justified.

In the contemporary age, Islamic law is bound to go through its own definitional processes which will be influenced by the inherited legacy of Islamic law, and by the power dynamics of its present context. For better or worse, these processes will result, and have resulted, in a re-negotiation and selective reconstruction of Islamic law. For example, both Saudi Arabia and Sudan, which claim to apply Islamic law as a whole, adopted the laws of banditry and apostasy into their legal systems but omitted, without comment, *'aḥkām al-bughā*.[1154] The Egyptian Criminal Code does use the term *bughā*; article 101 describes those who conspire or plot to overthrow the government as *bughā*, but otherwise no substantive aspect of *'aḥkām al-bughā* is adopted.[1155] In short, *'aḥkām al-bughā* has been excluded from the legal systems of all Arabic-speaking Muslim countries, while the law of banditry and the language of causing corruption on earth has been incorporated by some legal systems.

[1152] Kraemer, "Apostates," 63, has already noticed this point.

[1153] Muḥammad Rashīd Riḍā, *Tafsir al-Manār* (Cairo: al-Miṣriyya al-'Āmma li al-Kitāb, 1972), vol. 5, 299-300.

[1154] See Hillālī 'Aḥmad, *'Uṣūl al-Tashrī' al-Jinā'ī al-'Islāmī ma'a Ishārah 'ilā Taṭbīqātihi fī al-Mamlaka al-'Arabiyya al-Su'ūdiyya* (Cairo, 1995), 188-234; Lawyers Committee for Human Rights, *Beset by Contradictions: Islamization, Legal Reform and Human Rights in Sudan* (New York: Lawyers Committee for Human Rights, 1996), 62-3.

The juristic discourses of contemporary Muslim commentators are mixed, but are no less selective and reconstructive. For example, 'Āyatullāh Khumaynī (d. 1409/1989), in his *Taḥrīr al-Wasīla*, deals at length with the duty to enjoin the good and forbid the evil against an unjust ruler. Effectively, he advocates a balancing test in which the risk of harm is weighed against the importance of the religious interests at stake. The greater the religious interest, the more one should be willing to sacrifice himself and endure harm.[1156] He also deals with the technicalities of the law of banditry. His conception of banditry is very traditional; it is the terrorizing of the wayfarer for the purposes of usurping money.[1157] Interestingly, however, he does not mention or deal with *'aḥkām al-bughā*. One should not infer too much from this silence, but it is reasonable to suggest that the omission was a reconstructive act.[1158] Other writers who also reconstruct by partial omission include the idealogue of the Muslim Brotherhood, Sayyid Quṭb, who was executed in Egypt in 1386/1966. Quṭb does deal with *ḥirāba* and *baghy*, however he asserts that *ḥirāba* is the crime of armed rebellion against a just ruler who faithfully implements the Sharī'a. *Ḥirāba*, according to Quṭb, is the crime of resisting the application of the law of God, or fighting those who seek to apply the law of God. He does not mention highway robbery or terrorizing the wayfarer, but focuses on the idea that those who fight a genuine and true just ruler deserve the harsh penalties proscribed in the *ḥirāba* verse.[1159] Commenting on the *baghy* verse, Quṭb does not mention many of details of *'aḥkām al-bughā*. He only mentions that the *bughā*'s wounded, captive and fugitive should not be killed. However, he seems to consider *baghy* to be the act of two groups of Muslims having a quarrel and fighting with each other.[1160] In other words, according to Quṭb, rebellion against a just ruler is treated as a crime of corruption on the earth and not *baghy*. This reverses the doctrines of the classical tradition. Considering that Quṭb was a member of the Muslim Brotherhood and a rebel against the Egyptian government, it would seem that it would be in his interest to avail himself of the protections of the classical doctrines of *'aḥkām al-bughā*. Nonetheless, it is probable that Quṭb perceived his political opponents, i.e. the Egyptian government and its agents, to be engaged in the crime of corruption on the earth and in fighting God and His Prophet. It was very unlikely that the Egyptian government would have felt compelled or embarrassed by the doctrines of *'aḥkām al-bughā*. Therefore, it would have been more effective to assert, as Quṭb did, that those who fight the application of God's law, or fight those who seek to apply God's law are the most heinous criminals. This is a powerful condemnation of all those who oppose the imposition of Islamic law. It is a symbolic but effective undermining of the legitimacy of proponents of secularization. It is somewhat ironic, that Quṭb was executed after being accused of involvement in a variety of terrorist conspiracies including a charge of plotting to assassinate President Nasser of Egypt.

[1155] Article 101 provides that if a person joins the *bughā* but repents before being captured, and turns in his/her co-conspirators to the police, then that person will be pardoned. See Khālid al-Jamīlī, *'Aḥkām al-Bughā wa al-Muḥāribīn*, vol. 1, 308-9; Maḥmūd Muṣṭafā, *Sharḥ Qānūn al-'Uqūbāt: al-Qism al-'Āmm* (Cairo, 1964), 48-50; 'Aḥmad 'As'ad, *Qānūn al-'Uqūbāt al-Miṣrī* (Cairo, 1964), 161-91.

[1156] Rūḥ Allāh b. Muṣṭafā al-Mūsawī al-Khumaynī, *Taḥrīr al-Wasīla* (Tehran: Manshūrāt Maktabat al-I'timād, n.d.), vol. 1, 405-10.

[1157] Ibid., vol. 2, 443-5.

[1158] The reasons for the omission may be theological more than political. However, this omission is interesting in light of the fact that by May 1979, the revolutionary tribunal had executed 200 people for causing corruption on the earth. See Kraemer, "Apostates," 71.

The discourse of Rashīd Riḍā, one of the main reformers in the modern age, exhibits a dynamic similar to Quṭb's, but Riḍā's discourse is more sophisticated. He broadly defines *ḥirāba*, arguing that besides including highway robbery, rape and similar crimes, it also includes those who resist the application of Sharī'a.[1161] Riḍā emphasizes that the constitutive elements of the crime of *ḥirāba* must be subject to re-consideration and re-definition in light of modern needs and interests.[1162] *Ḥirāba*, according to Riḍā, focuses on the act of causing corruption on the earth, and, therefore, it includes those who form groups in order to resist the application of *Sharī'a* (Islamic law).[1163] Riḍā, however, transforms this discourse into a justification for the overthrow of unjust rulers. He argues that it is obligatory to overthrow rulers who cause corruption on the earth by oppressing people. Such rulers lack legitimacy and should be removed by force, if possible. Furthermore, he approvingly cites as an example the overthrow of the Ottoman ruler, Sulṭān 'Abd al-Ḥamīd II in 1293/1876.[1164] The subtleties of Riḍā's discourse become more apparent when one notices that he remarks, rather casually, that some have claimed that the Khawārij, and those who rebelled against 'Alī were *muḥāribs* (bandits). Such a claim, Riḍā argues, is erroneous because those rebels relied on an interpretation (*ta'wīl*).[1165] The sum total of Riḍā's discourse is that tyrants should be overthrown, rebels who seek to fight the law of God are bandits, but rebels who rely on an interpretation are not bandits. This provides Riḍā with considerable room to negotiate his discourses in response to his own context. Importantly, his argument that unjust rulers could be considered the equivalent of bandits derives its legitimacy from the discourses of the revisionist trend.

[1159] Sayyid Quṭb, *Fī Ẓilāl al-Qur'ān* (Cairo: Dār al-Shurūq, 1987), vol. 2, 878-9.

[1160] Ibid., vol. 6, 3343-4.

Several contemporary Muslim jurists, who had the benefit of a French education, negotiated and reconstructed the classical discourses of *'aḥkām al-bughā* towards a very different result. Among those jurists was judge 'Abd al-Qādir 'Ūdah who was one of the leaders of the Muslim Brotherhood in Egypt in the 1960's, and who was executed with Sayyid Quṭb in 1966. 'Ūdah, and several others, argued that *'aḥkām al-bughā* is the equivalent of the doctrine of political crimes in Europe. Pursuant to this doctrine, those who commit political crimes are not to be treated as common criminals, they may not be executed or tortured, and their property may not be confiscated. 'Ūdah, and others, defined political crimes as the non-violent or violent opposition to a government, as long as the motivation is political and the target of the crime is governmental. In other words, attacking a police station might qualify as a political crime, but attacking a movie theater would not. Importantly, they argued that *'aḥkām al-bughā* should apply whether the ruler is just or not. The approach of these jurists tended to be very technical and detached, conveying the impression of objectivity.[1166] Nonetheless, their dynamic is negotiative and reconstructive. They conceded that *baghy* is a crime, but it is a crime that calls for a preferential and humane treatment. Essentially, this discourse reconstructed *'aḥkām al-bughā* in order to co-opt a particular humanitarian European tradition.[1167] In many ways, it Islamized the European, particularly French, doctrine of political crimes.

[1161] Riḍā, *Tafsīr*, vol. 5, 295.

[1162] Ibid., vol. 5, 297.

[1163] Ibid., vol. 5, 296.

[1164] Ibid., vol. 4, 367-8.

[1165] Ibid., vol. 5, 303-4.

This brief survey of some of the contemporary dynamics of *'aḥkām al-bughā* is not intended to be exhaustive. A separate, extensive, and fairly long, study on the contemporary discourses is needed. Rather, this survey is intended to demonstrate tendencies and potentialities. Furthermore, this survey suggests that in the same fashion that Islamic law was creatively constructed in the past, it will be constructed in the present. How creative or profound this construction will be depends on many variables including social, political and economic factors, and it will also depend on the structural nature of the contemporary Islamic juristic culture. But as Conley and O'Barr noted, "when we look into the past, we find the antecedents of some of the most significant socio-legal issues in our own world."[1168] The pre-modern juristic culture weighed the moral and ethical with the political and pragmatic, and weighed the symbolic and educative with the practical and technical, and achieved a rich and creative discourse. Contemporary articulations of Islamic law often derive legitimacy from the juridical traditions of the past. Indeed, to the extent that the premodern Islamic discourses constitute part of the cumulative legal heritage, if through the power dynamics of society these discourses are revived in the modern mind, they will exert a certain degree of influence on how rebels are perceived and treated in the contemporary age. To the extent that we can learn from the past, the idea of aspiring to limit the discretion of the state in dealing with its opponents, even those who are violent, seems to be immanently reasonable.

[1166] See 'Ūdah, *al-Tashrī' al-Jinā'ī*, vol. 1, 100-9, vol. 2, 671-705; Sanad, *Naẓariyat al-Jarīma al-Siyāsiyya*, chap. 3 et seq.; Abū al-Faḍl, "*Jārimat al-Baghy*," 69.

[1167] On political crimes in Western and Islamic law, see Abou El Fadl, "Political Crime in Islamic Jurisprudence and Western Legal History," 1-28. On political crimes in European law see Barton L. Ingraham, *Political Crime in Europe: A Comparative Study of France, Germany and England* (Berkeley: University of California Press, 1979).

[1168] Conley and O'Barr, *Just Words*, 128.

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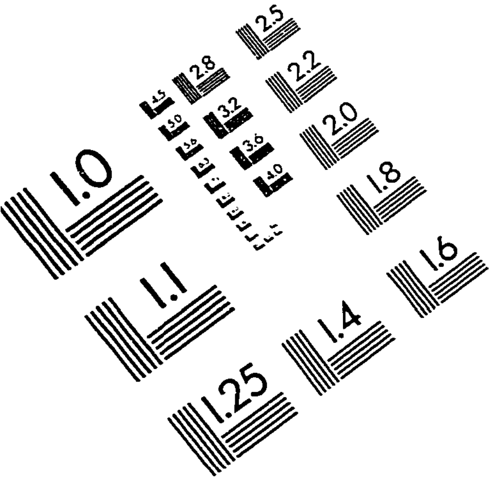
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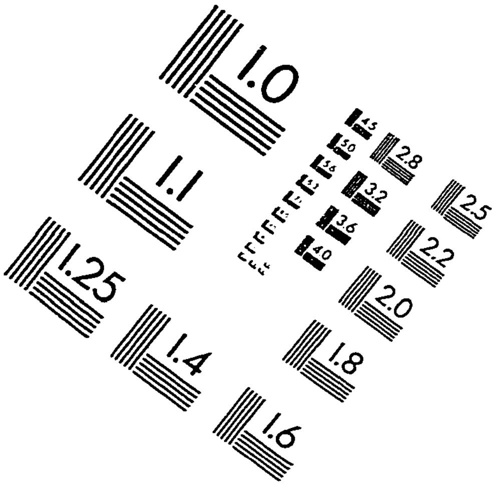
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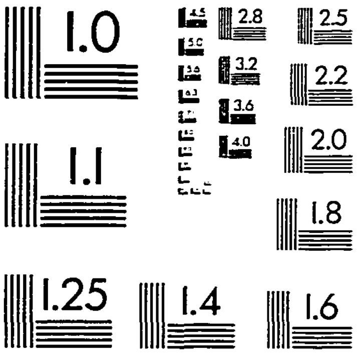
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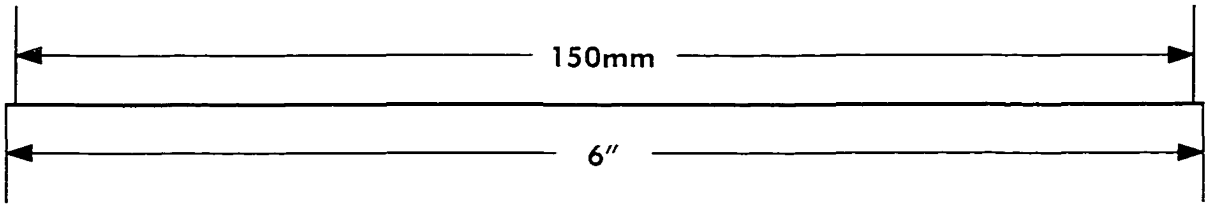

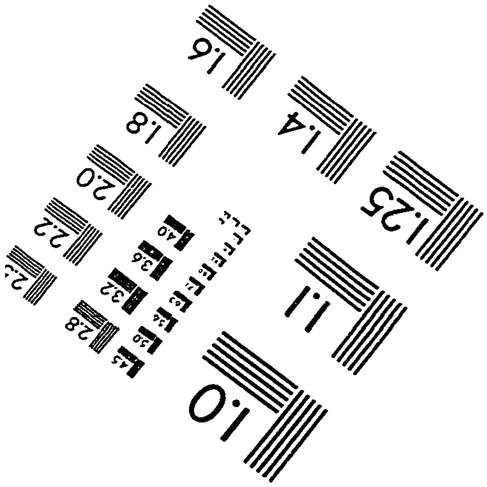
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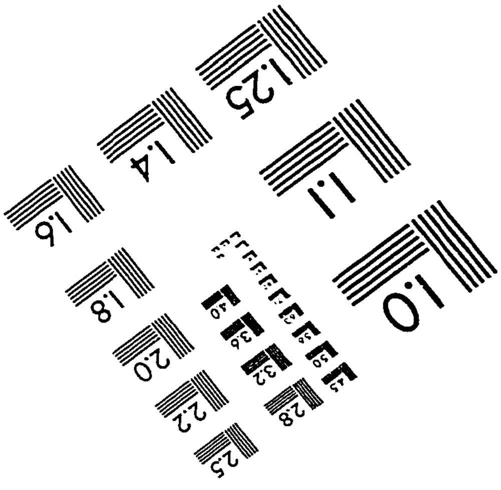
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